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A TREATISE

ON THE

LAW RELATING TO ELECTRICITY.

BY

SIMON G. CROSWELL,

FORMERLY OF THE LAW DEPARTMENT OF THE THOMSON-HOUSTON ELECTRIC COMPANY AND GENERAL ELECTRIC COMPANY;

AUTHOR OF "A TREATISE ON THE LAW RELATING TO EXECUTORS AND ADMINISTRATORS," AND "A COLLECTION OF PATENT CASES."

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PREFACE.

The rapid application of Electricity to various commercial uses has produced a corresponding growth of statutes and adjudged cases, until there has been formed a considerable branch of the law devoted wholly to these subjects.

The aim of this book is to set forth this body of law in its present development. Prominent among the subjects which are included in this treatise are the Nature and Qualities of the various Franchises necessary for Electrical Lines and the mode of acquiring them, including the important Federal Franchise of Telegraph Companies; the Liability of Electrical Companies for Negligence in the Construction and Maintenance of their lines and machinery; the Municipal Ownership of Electric Light Plants; the Placing of Wires Underground; the Conflicting Rights of Electric Railways and Telephones in the same highways; the decisions as to the Operation of electric lines, including especially Telegraph lines, and covering the Prevention of Discrimination, the Liability for Errors or Delay in the Transmission of telegrams; the various Stipulations on the printed Telegraph Blanks and their effect on the Duties and Liability of the telegraph company;

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the Measure of Damages in suits against Telegraph Companies, and important chapters on the Taxation of Electric Companies and on Electric Railway accidents.

No previous book contains all the topics discussed in this work, and several important subjects herein contained have never before been discussed in any book.

The idea of this work was suggested to the author by his experience of the need of such a book while one of the Law Department of the General Electric Company, and this volume has grown from that experience, and is now offered to the profession in the hope that it may relieve at least in some degree their arduous labors in the matters of which it treats.

S. G. C.

Cambridge, Mass., September, 1895.

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THE LAW OF ELECTRICITY.

BOOK I.

INCORPORATION AND FRANCHISES.

CHAPTER I.

INTRODUCTORY.

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§ 1. **Introduction.** — The application of electricity to various commercial purposes and to practical uses began in the early years of this century, and has rapidly grown until at the present time, in its various forms, it has become a necessary part of most important transactions of the business and social world. In the order of priority of time of these applications, it may be said that the telegraph comes first, the electric light next, the telephone third, the electric

railway fourth, while the applications of electricity to produce power and heat have been developed at various times during the whole period. All these new commercial uses of electricity have from time to time come before the courts in numerous litigations, and the decisions in these cases have produced a large body of new rules of law, or more strictly, new applications of old rules to changed circumstances, which form a substantial addition to the sum total of the common law. Moreover, the important and novel character of these electrical uses has rendered necessary the passage of numerous statutes regulating their introduction and operation, and these statutes have formed a substantial addition to the statutory law. It is the purpose of this work to collect in an orderly arrangement this law relating to electricity both as settled by the decisions of the courts and as enacted in the statutes, so as to present a substantially complete statement of this branch of the law as it stands at the present day, excepting, however, the Patent Law Cases, which are so essentially different as to require a separate treatise.

§ 2. **General Characteristics.** — Before going into the detailed statement of the law relating to electrical uses and appliances, it will be advantageous to take a summary view of certain main characteristics of these new appliances and their relations to the business and social world, as fixed by the various decisions of the courts and by the statutes, to see how far they have been assimilated to previously existing modes of doing business, and how far they have rendered necessary the introduction of new principles and stand by themselves differing essentially from anything previously known to the law. In taking this summary view, the four leading branches of applied electricity will be considered separately, *i. e.*, the Telegraph, the Telephone, the Electric Light, and the Electric Railway; but in the remainder of this work it will be possible in many cases to combine all

these together, or one or more, owing to the similarity of the subject-matter.

§ 3. **The Telegraph.** — The telegraph, being the first of the electric appliances in point of time to which the courts and legislatures gave their attention, naturally comes first in the consideration of the general characteristics of the various electrical uses.

§ 4. **Public Character of the Telegraph. England.** — A distinguishing characteristic of telegraphy in its most important development, is that it is a public employment, and those corporations which engage in it possess all the powers and rights, and are subject to all the duties, which appertain to such an employment. This was not the case in England when the telegraph was first introduced there; but it had not been long in operation in that country before its great importance to the public was appreciated, and statutory authority was given the Postmaster-General to acquire such telegraph lines as he might deem for the public interest, and constitute them one of the departments of his office.[1] Even now, however, it may be questioned whether the English courts would adopt in its fullest extent, as established in the United States, the doctrine of the public character of the telegraph business.[2]

§ 5. **Public Character of Telegraphy in the United States.** — In the United States, however, the public character of the business of telegraphy has been recognized from its earliest introduction, and both the courts and the legislatures have combined by decision and statute to impress upon the business of telegraphy all the characteristics of public employments. The characteristic features thus given to a corporation carrying on the business of telegraphy are its power to condemn a right of way for the construction of its line by right

[1] See Atty.-Gen. *v.* Edison Telephone Co., 6 Q. B. Div. 244.

[2] See Playford *v.* United Kingdom Electric Telegraph Co., L. R. 4 Q. B. 706; Dickson *v.* Reuter's Telegraph Co., L. R. 2 C. P. Div. 62.

of eminent domain; its right to prescribe reasonable rules and regulations for the conduct of its business; its obligations to serve the public without discrimination, to charge equal rates to all, and to transmit messages with promptness and care. The decisions and statutes which affix these rights and obligations to the telegraph companies, and stamp the business with its public character, are principally those in which the acquirement of rights of way by the telegraph companies and the transmission of despatches are concerned, and are considered fully in subsequent chapters.[1]

§ 6. **Test of Public Character.** — The test of the public character of the business which has been applied to telegraphy, and by which it is decided that the employment is a public one, is the principle that if a business is a benefit and advantage to the public, and the person or corporation engaged in it is under a legal duty to serve the public at large, or such portion of it as may choose to avail itself of the privilege, then the business is a public one.[2] Tested by this principle, the business of telegraphy is obviously a public business.[3] The advantage and benefit to the public is obvious. The duty to serve the public is in most States expressly enacted by statute;[4] but where it is not expressed, the courts infer it from other statutory provisions relating to the business, such as the obligation to establish and keep open offices, to transmit messages with diligence and without discrimination, to charge only limited prices for transmission, and the power to take private property for telegraphic uses;[5]

[1] *Post*, cc. iv., v., vi., vii., xiv., *et seq.*

[2] State, Trenton & New Brunswick Turnpike Co. *v.* American & European Commercial News Co., 43 N. J. L. 381; Lumbard *v.* Stearns, 4 Cush. 60.

[3] New Orleans, Mobile & Texas Ry. Co. *v.* Southern & Atlantic Telegraph Co., 53 Ala. 211.

[4] See statutes, *infra*, cc. xiv., xv.

[5] State, Trenton & New Brunswick Turnpike Co. *v.* American & European Commercial News Co., 43 N. J. L. 381.

and it has been held that even if this duty to serve the public is neither expressly imposed by statute nor implied in other statutory provisions, yet since the telegraph has become so essential to the transaction of the business of the country, the implication is very strong that the legislature, in granting a telegraph company its corporate franchise, intends to charge the company with a duty to the public.[1] These special powers and duties remove the business of telegraphy at once out of the class of ordinary private employments, and make it a public employment to be carried on with a view to the general benefit and for the accommodation of the community, and not merely for private emolument and advantage, and the person or corporation owning or managing a line of telegraph becomes to a certain extent a public servant or agent,[2] and analogous in legal position to those carrying on other public employments, viz., common carriers, and light, gas and water companies, and other similar public conveniences.[3] The various rights and obligations arising out of this public character of the telegraph business, to wit, the power of acquiring the right of way for the telegraph line by the right of eminent domain, the obligation to serve the public without discrimination and with care and at fair and regular prices, will be discussed separately later.[4]

[1] State, Trenton & New Brunswick Turnpike Co. *v.* American & European Commercial News Co., 43 N. J. L. 381.

[2] Ellis *v.* American Telegraph Co., 13 Allen, Mass. 226, 231.

[3] Primrose *v.* Western Union Telegraph Co., 154 U. S. 1, 14; Western Union Telegraph Co. *v.* Reynolds, 77 Va. 173, 183; Wadsworth *v.* Western Union Telegraph Co., 86 Tenn. 695, 706; Young *v.* Western Union Telegraph Co., 107 N. C. 370, 372; New York & Washington Printing Telegraph Co. *v.* Dryburg, 35 Pa. St. 298, 302; Passmore *v.* Western Union Telegraph Co., 78 Pa. St. 242; DeRutte *v.* New York, Albany & Buffalo Magnetic Telegraph Co., 1 Daly, 547, 558; Bartlett *v.* Western Union Telegraph Co, 62 Me. 209, 217; Western Union Telegraph Co. *v.* Carew, 15 Mich. 525, 532; Sweatland *v.* Illinois & Mississippi Telegraph Co., 27 Iowa, 433, 452; Parks *v.* Alta California Telegraph Co., 13 Cal. 423, 424.

[4] See *post*, cc. iv., v., vi., vii., xiv., *et seq.*

§ 7. **A Telegraph Company not a Common Carrier.** — The public character of the employment of telegraphy being settled, the courts endeavored in the earlier decisions to range telegraph companies in one of several existing classes of public employments. The most obvious analogy, and the one which has been urged upon the courts with great persistency in many telegraph cases, especially in the earlier ones, was that of a common carrier. There are many points of resemblance between telegraph companies and common carriers. The obligation of giving the public efficient service, and fixing regular and fair rates of tariff, as well as the right of eminent domain, assimilated them very closely to the largest and most important branch of common carriers, *i. e.*, railroad companies. Moreover, the telegraph grew up with railroading, and is a necessary part of and constructed along the railway line. Most important of all, however, in bringing the telegraph companies close to railroad companies or other common carriers was the introduction by telegraph companies of a printed blank form upon which the telegram was to be written, and which contained certain stipulations intended to limit the liability of the telegraph company in cases of error or delay in the transmission or delivery of the message. These stipulations were very similar to stipulations adopted by common carriers to limit their liability in similar instances, and being brought before the courts in many early cases, while the position of the telegraph company was still uncertain, had great effect in supporting the arguments of those who contended that the telegraph company was, in the eye of the law, a common carrier. The courts, however, have rejected this theory of the status of the telegraph company in the very important class of cases where the liability of telegraph companies for negligence in the transaction of their business is concerned. This liability will be discussed at length later,[1] and it is sufficient here to

[1] See *post*, cc. xxv., xxvi.

say that, with the exception of a few early cases, of which one in California is the strongest,[1] and some *dicta*, the courts have unanimously declared that the telegraph company is not a common carrier, although it occupies a position in many respects analogous to it in the law.[2] The difference between the employment of the common carrier and of the telegraph company is very wide. A common carrier has the exclusive possession and control of the goods to be carried, with peculiar opportunities for embezzlement or collusion with thieves, as well as with peculiar facilities for the protection and safeguard of the goods intrusted to him. The identity of the goods received by the carrier with those delivered to the consignee is capable of easy identification, and cannot be mistaken. Their value may be readily estimated with a view to ascertaining the amount of care which should be exercised by the carrier while the goods are in transit, and may be ascertained by inquiry of the consignor and the carrier's compensation fixed accordingly, and his liability in damages is measured by the value of the goods. On the contrary, the telegraph company is intrusted with nothing but certain words or characters, and these words or characters are to be transmitted by symbols over the wires through the aid of electricity. This transmission is done by delicate instruments peculiarly subject to atmospheric disturbances or other injury, and over long stretches of wire which, in the nature of things, cannot be at all times under the care and supervision of the telegraph company. The

[1] Parks *v.* Alta California Telegraph Co., 13 Cal. 422.

[2] Primrose *v.* Western Union Telegraph Co., 154, U. S. 1; Birney *v.* New York & Washington Printing Telegraph Co., 18 Md. 341, 357; Western Union Telegraph Co. *v.* Carew, 15 Mich. 525, 532; Grinnell *v.* Western Union Telegraph Co., 113 Mass. 299, 301; Ellis *v.* American Telegraph Co., 13 Allen, 226, 232; True *v.* International Telegraph Co., 60 Me. 9; Bartlett *v.* Western Union Telegraph Co., 62 Me. 209; Breese *v.* United States Telegraph Co., 48 N. Y. 132, 140; Telegraph Co. *v.* Griswold, 37 Oh. St. 301, 310; New York & Washington Printing Telegraph Co. *v.* Dryburg, 35 Pa. St. 298; Tyler *v.* Western Union Telegraph Co., 60 Ill. 421, 427.

symbols transmitted cannot be the subject of embezzlement, and are of no intrinsic value, and the importance of the message itself cannot be estimated by the sender nor ordinarily disclosed by him without danger of defeating his own purposes. The information contained in the message may become wholly valueless if not forwarded immediately, and the measure of damages has no relation to any value which can be put on the message itself.[1] These reasons have influenced the courts in deciding that a telegraph company is not a common carrier. It must be admitted, however, that there is a great and close analogy between the two which displays itself in other points than that of liability for the transmission of goods, such, for instance, as the obligation to serve the public alike without discrimination,[2] and the power to acquire private property by the right of eminent domain.[3]

§ 8. **Telegraph Company not a Bailee for Hire.** — In a few cases the courts, led by the fact that they could not assimilate the liability of telegraph companies for negligence in transmitting a message to the liability of a common carrier for negligence in the transportation of goods, have endeavored to assimilate the employment of a telegraph company to that of an ordinary bailee for hire; that is, that while not an

[1] Grinnell *v.* Western Union Telegraph Co., 113 Mass. 301; Primrose *v.* Western Union Telegraph Co., 154 U. S. 1.

[2] Delaware & Atlantic Telegraph & Telephone Co. *v.* State, 50 Fed. Rep. 677; Smith *v.* Gold & Stock Telegraph Co., 42 Hun (N. Y.) 454; Telegraph Co. *v.* Griswold, 37 Oh. St. 301; Baldwin *v.* United States Telegraph Co., 1 Lansing, 125; Western Union Telegraph Co. *v.* Reynolds, 77 Va. 173; see *post*, cc. xiv., xv.

[3] Telegraph Co. *v.* Griswold, 37 Oh. St. 301; Pinckney *v.* Western Union Telegraph Co., 19 S. C. 71; see *post*, cc. v. vi. It may be noted here that a district messenger company which has its call boxes placed round in various places and supplies messengers is a public carrier, and the call boys who carry packages or notes at the call of customers are the agents of the company, and if they lose packages entrusted to them, the company is responsible. Sanford *v.* American District Telegraph Co., 27 N. Y. Suppl. 142.

insurer like the common carrier, it is liable for negligence in the transaction of its business.[1] This view is based upon the assumption that the sender of a telegraph message bails or entrusts it to the telegraph company for a certain purpose, and the telegraph company accomplishes this purpose by doing certain work and bestowing certain care upon the thing bailed for a stipulated reward. This analogy has the advantage that the liability of the telegraph company and of the bailee for hire for the conduct of their business is the same; that is, a liability simply for negligence and not as an insurer; but on the other hand, in addition to the differences set forth above as to the nature of the occupation, in considering the analogy of the common carrier,[2] there is a further radical difference in the fact that the ordinary bailee for hire is not engaged in a public employment, he may accept or refuse such employment as is offered to him, and is under none of the obligations, and has none of the powers that appertain to the telegraph company by virtue of its public employment. It has been definitely asserted by the Supreme Court of the United States, in a somewhat recent case, that a telegraph company is not a bailee.[3]

§ 9. **Bailee locatio operis faciendi.** — In view of the above difficulties, the court, in at least one case, has held that a telegraph company, as to the work which it engages to do, belongs to the class of bailment which is styled *locatio operis faciendi*;[4] but, as before said, the Supreme Court of the United States has explicitly decided that this is not the situation of the telegraph company.[5]

§ 10. **True Position of the Telegraph Company.** — The result of the decisions is clearly that the telegraph company occupies

[1] Western Union Telegraph Co. *v.* Fontaine, 58 Ga. 433; Birney *v.* New York & Washington Printing Telegraph Co., 18 Md. 341.

[2] *Supra*, § 7.

[3] Primrose *v.* Western Union Telegraph Co., 154 U. S. 1.

[4] Pinckney *v.* Western Union Telegraph Co., 19 S. C. 71.

[5] Primrose *v.* Western Union Telegraph Co., 154 U. S. 1.

a position of its own in the eye of the law; that it is not a common carrier, nor is it a bailee, and that the courts will apply (as they have in fact done) from time to time such appropriate rules of law from analogous departments as seem to them best calculated to carry out in detail the general public character of the telegraph company. No better summary of this branch of the subject could be made than is contained in the opinion of the Supreme Court of the United States in the case of Primrose *v.* Western Union Telegraph Company,[1] where the court says, "Telegraph companies resemble railroads and other common carriers in that they are instruments of commerce, and in that they exercise a public employment, and are bound to serve all customers alike without discrimination. They have doubtless a duty to the public to receive to the extent of their capacity all messages clearly and intelligibly written, and to transmit them upon reasonable terms. But they are not common carriers. Their duties are different, and are performed in different ways, and they are not subject to the same liabilities. . . . Telegraph companies are not bailees in any sense. They are entrusted with nothing but an order or message which is not to be carried in the form in which it is received, but is to be translated and transmitted through different symbols by means of electricity, and is peculiarly liable to mistakes. The message cannot be the subject of embezzlement; it is of no intrinsic value. Its importance cannot be estimated except by the sender, and often cannot be disclosed by him without danger of defeating his purpose. It may be wholly valueless if not forwarded immediately, and the measure of damages for a failure to deliver it has no relation to the value of the message itself except as such value may be disclosed by the message or be agreed between the sender and the company."

§ 11. **Federal Franchise.** — A very peculiar feature of the

[1] 154 U. S. 1.

position of telegraph companies, and one which will be found to exercise a great effect upon the development of the law as applied to them, is their possession of what may be called a federal franchise, whereby telegraph companies are differentiated even from the ordinary public occupations to which they have been likened heretofore.[1] This franchise is contained in an act of the United States Congress passed in the year 1866,[2] and now contained in the United States Revised Statutes.[3] By this act in substance all telegraph companies which accept its provisions by a writing filed with the postmaster-general are given the right to set their poles and string their wires over all the post roads of the United States, and are obliged in return to transmit messages for the federal government. The detailed effects of this act will be discussed later;[4] but the general effect has been to add two novel features to the telegraph business, and to make it both an accredited agent of the federal government and a means of interstate commerce, thus putting the telegraph at once under the special protection of the federal government, and in many ways bringing telegraphic communications within the scope of that section of the federal constitution which vests in Congress alone the right to regulate commerce among the several States.[5] The consequences of this act are far reaching in various matters relating to telegraph companies, such as the prohibition of exclusive franchises to any one telegraph company, the prohibition of State taxes upon interstate telegraphic business, and the prohibition of extra-territorial effect to State statutes regarding the business of telegraphy. These various effects will be discussed later.[6] The case in which this act was first construed and telegraph companies first taken under the special protection of the federal courts is Pensacola

[1] *Supra*, §§ 7–10.
[2] Act of July 24, 1866.
[3] U. S. R. S. §§ 5263 *et seq.*
[4] See *post*, c. iii.
[5] Constitution of the United States, Art. 1, § 8.
[6] See *post*, c. iii.

Telegraph Company *v.* Western Union Telegraph Company,[1] a case in the Supreme Court of the United States, and a quotation from the opinion of Mr. Chief Justice Waite gives the clearest possible statement of this position.

§ 12. **Opinion in Pensacola Telegraph Company v. Western Union Telegraph Company.** — "The electric telegraph marks an epoch in the progress of time. In a little more than a quarter of a century it has changed the methods of business, and become one of the necessities of commerce. It is indispensable as a means of intercommunication, but especially is it so in commercial transactions. . . . It is important, not only to the people, but to the government. By means of it the heads of the departments at Washington are kept in close communication with all their various agencies at home and abroad, and can learn at almost any time by inquiry what is transpiring anywhere that affects the interests they have in charge. Under such circumstances it cannot be for a moment doubted that this useful agency of commerce and intercommunication comes within the controlling power of Congress fairly as against hostile State legislation. . . . The statute of July 24, 1866, in effect amounts to prohibition of all monopolies in this particular. It substantially declares, in the interest of commerce and the convenient transmission of intelligence from place to place by the government of the United States and its citizens, that the erection of telegraph lines shall, so far as such interference is concerned, be free to all who will submit to the condition imposed by Congress, and that corporations organized under the laws of one State for constructing and operating telegraph lines shall not be excluded by another from prosecuting their business within its jurisdiction if they accept the terms proffered by the national government for this privilege. To this extent certainly the statute is a legislative regulation of commercial intercourse among the States, and is appropriate legislation

[1] 96 U. S. 1.

to carry into execution the powers of Congress over interstate commerce. It gives no foreign corporation the right to enter upon private property without the consent of the owners, and erect the necessary fixtures for its business; but it does provide that when the consent of the owner is obtained, no State legislature shall prevent the occupation of post roads for telegraph purposes by such companies as are willing to avail themselves of its privileges." [1]

§ 13. **Telephone is a Telegraph.** — Taking up now the consideration of the general characteristics of the telephone, we find that the introduction of the telephone gave rise to a series of decisions in regard to the legal position of the telephone in relation to other electrical appliances. Its obvious similarity to the telegraph in main features of construction and operation led the courts at once to consider this analogy, the only difference in the two systems being in the terminal instruments. These instruments are wholly different in construction and principle, but are in fact operated by the same agency, — electricity. The striking similarity between the two systems induced the courts to decide from the earliest cases that the telephone is, in effect, a species of telegraph, and comes under the same general rules of law as the earlier instrument.[2] The decisions have not been numerous enough

[1] See also, Western Union Telegraph Co. *v.* Texas, 105 U. S. 460; Western Union Telegraph Co. *v.* Atty.-Gen., 125 U. S. 530; Ratterman *v.* Western Union Telegraph Co., 127 U. S. 411; Leloup *v.* Mobile, 127 U. S. 640; Western Union Telegraph Co. *v.* Pennsylvania, 128 U. S. 39; Western Union Telegraph Co. *v.* Alabama, 132 U. S. 472.

[2] Atty.-Gen. *v.* Edison Telephone Co., 6 Q. B. Div. 244; Wisconsin Telephone Co. *v.* Oshkosh, 62 Wis. 32; Central Pennsylvania Telephone & Supply Co. *v.* Wilkesbarre & West Side Street Railway Co., 11 Pa. C. C. 417; Chesapeake & Potomac Telephone Co. *v.* Balt. & Oh. Telegraph Co., 66 Md. 399; Telephone Co. *v.* Board of Equalization, 67 Ia. 250; Roberts *v.* Wisconsin Telephone Co., 77 Wisc. 589; Franklin *v.* Northwestern Telephone Co., 69 Ia. 97; Com *v.* Pennsylvania Telephone Co., 42 Leg. Int. 180; Cumberland Telephone & Telegraph Co. *v.* United Electric Railway Co., 42 Fed. Rep. 273; State, Duke *v.* Central New Jersey Telephone Co., 53 N. J. L. 341; Roake *v.* American Telegraph & Telephone Co., 41 N. J. Eq. 35.

as yet to follow out this analogy in all points, but they have covered so many main features that the analogy is now well fixed, and it may safely be asserted that in applying the principles of the common law or in construing the statutes, unless express statutory provision governs the case otherwise, the telephone is to be considered a telegraph, and what has been said previously of the legal position of the telegraph applies to telephones as well.[1]

§ 14. **English Case. Attorney-General v. Edison Telephone Company.** — An important case in which this question was brought up in England is Attorney-General *v.* Edison Telephone Company.[2] In England the telegraph system is now, as has been said,[3] made subject to governmental ownership and control, the postmaster-general being the official who has the government business of telegraphy in his department. The attorney-general, at the instance of the postmaster-general, brought an information against a telephone company for a penalty, the ground for this information being alleged to be that the telephone was in reality a telegraph, and therefore should be under the control of the postmaster-general's department. The court discussed the question at great length of whether a telephone line is a telegraph line or not, and decided that it was; that the main features of construction and operation were identical, and that the mere fact that the instruments at either end operated in a different manner was not sufficient to differentiate the two lines. How far questions of public policy may have entered into this decision it is impossible to say.

§ 15. **Wisconsin Case. Wisconsin Telephone Company v. Oshkosh.** — In an early case in this country,[4] the same question arose in another form, the particular point in this case

[1] Cases, *supra*, §§ 4–12; also *infra*, § 18.

[2] 6 Q. B. Div. 244.

[3] *Supra*, § 4.

[4] Wisconsin Telephone Co. *v.* Oshkosh, 62 Wis. 32.

being whether a telephone company could legally be incorporated under a general statute providing for the incorporation of telegraph companies. It is to be observed that there was no statute in Wisconsin expressly providing for the incorporation of telephone companies as such, and that the company in question was already incorporated and doing business, and that great loss would have been occasioned to its stockholders, had it been held that the company was illegally organized. The court considered the English case,[1] and accepted its reasoning, and decided that the telephone is a telegraph, that a company incorporated under the general telegraph act may build and operate a telephone line, and may call itself a telephone company.

This decision was followed in later cases on the same point in other States.[2]

§ 16. **Telephone a Telegraph** (*continued*). — The same principle that a telephone line is a species of telegraph line was brought up in another case,[3] in which the question was whether a telephone company was a telegraph company in such a sense as to come under the statute providing for the taxation of telegraph companies. The court held that it was. In this case it is also to be noted that there was no statute expressly taxing telephone companies as such, and that the effect of holding that the telephone company was not a telegraph company would have been to deprive the city of the revenue which it might have raised from the taxation of the telephone company as a telegraph company. In still another case it was held that a telephone is a telegraph in so far as that a power in a city government to "license, tax, and regulate" telegraph companies will apply also to tele-

[1] Atty.-Gen. *v.* Edison Telephone Co., 6 Q. B. Div. 244; *supra*, § 14.

[2] Central Pennsylvania Telephone & Supply Co. *v.* Wilkesbarre & West Side St. Ry. Co., 11 Pa. C. C. 417; Cumberland Telephone & Telegraph Co. *v.* United Elec. Ry. Co., 42 Fed. Rep. 273; Chesapeake & Potomac Telephone Co. *v.* Baltimore & Ohio Telegraph Co., 66 Md. 399.

[3] Telephone Co. *v.* Board of Equalization, 67 Ia. 250.

phone companies.[1] Still further, in a case in New Jersey,[2] the court held that a telephone company is a telegraph company in such a sense that it may exercise the right of eminent domain and condemn a right of way under a statute giving this right to telegraph companies. This is perhaps the strongest case decided, as the statute giving the right of eminent domain is always construed strictly as being in derogation of the common law, and to hold that the words "telegraph company" in such a statute include telephone companies is practically the same as declaring that such companies are radically identical. Here it is again to be noted that the company was organized, and had expended large sums of money in construction, and depended upon the right of eminent domain for a portion of its right of way.[3]

§ 17. **Telephone a Telegraph** (*continued*). — Duke *v.* Central New Jersey Telephone Company. In this case the court set forth very clearly the identity of the two forms of business as follows: —

"The discovery of this method of communication [telephony] and its application to the purposes of the speedy transmission of intelligence was but a change in detail but not in substance of the business for which the companies were clothed with corporate privileges. They are both services of a public nature which would permit the legislature to confer the power to condemn for each use. They are both designed to convey intelligence between distant places. So far as the owner over whose land their wires or cables lie is concerned they are operated with the same appliances. Poles and wires placed alike impose exactly the same servitude

[1] St. Louis *v.* Bell Telephone Co., 96 Mo. 623.

[2] State, Duke *v.* Central New Jersey Telephone Co., 53 N. J. L. 341.

[3] Several other cases follow the above principle that a telephone is a species of telegraph. Cumberland Telephone & Telegraph Co. *v.* United Elec. Ry. Co., 42 Fed. Rep. 273; Roberts *v.* Wisconsin Telegraph Co., 77 Wisc. 589; Franklin *v.* Northwestern Telephone Co., 69 Ia. 97; Com. *v.* Pennsylvania Telephone Co., 42 Leg. Int. 180.

upon the land. With a change in the apparatus at the termini telegraphy becomes telephony. The former makes the distant message intelligible by words, marks, and sounds, the latter by sounds alone. The same electric fluid is the medium of transmission, and all the interterminal structure is the same in both. A corporation employing either means of communication is exercising substantially the same public function in substantially the same way."[1]

§ 18. **Telephone is a Public use.** — As would be expected from the foregoing decisions confirming the identity between the telegraph and the telephone, the court has held that a telephone company is engaged in a "public business" in the same manner as a telegraph company is. This similarity was announced in the case just considered which involved the exercise of the right of eminent domain by a telephone company under a statute giving this right to a telegraph company. The court considers the question of the various uses of the telephone, and after deciding that the telephone is, in effect, a telegraph in all essential particulars, and as such is entitled to all the privileges which the telegraph company from its public character possesses, further holds that a telephone company has, so far as its occupation is concerned, the same public duty of serving the community, and confers the same public benefit and advantage upon the community, which vests it with the character of a public corporation with all the implied rights and duties appertaining to such corporations.[2] And in cases in which the point involved was the obligation of the telephone companies to furnish equal facilities to all the public, the courts have asserted the public nature of the business.[3]

[1] State, Duke *v.* Central New Jersey Telephone Co., 53 N. J. L. 341.

[2] Ibid.

[3] Delaware & Atlantic Telegraph & Telephone Co. *v.* State, 50 Fed Rep. 677; s. c. 47 Fed. Rep. 633; State of Missouri *v.* Bell Telephone Co., 23 Fed. Rep. 539; State *v.* Nebraska Telephone Co., 17 Neb. 126, and see c. xiv.

§ 19. **Electric Light. — General Characteristics.** — In considering the important characteristics of electric lighting, the third of the great electrical industries, there are few striking features. An electric lighting plant is confined to a small local territory, and does not spread over large tracts of country as telegraph and telephone lines do. It is merely a development of the gas-lighting business, and although it is of great practical value and convenience, it does not have the features of national interest which the telegraph, and to a lesser degree the telephone, have. However, there are two important features which electric lighting has; first, that in common with the telegraph and telephone it is a "public business," and has all the rights and is subject to all the obligations of such a business, as has been said in regard to the telegraph company; and second, that it is in many cases at the present day becoming a part of the municipal improvements which city and town governments take into their ownership and under their authority and control, thus giving it a status as a portion of the complicated aggregation of powers, rights, and duties which are called municipal corporations.

§ 20. **Electric Light a Public Use.** — The public character of the electric lighting business arises from the great public convenience and advantage of this form of lighting both in public places and for individuals. While the section of the community which avails itself of this advantage is perhaps more limited than of the telegraph, yet the public nature of the advantages offered by these companies, and their obligation to extend these advantages to any portion of the public which may desire to avail itself of the same within the limits in which the company does its business, give it a public character similar to the telegraph and telephone.[1]

[1] Opinion of the Justices, 150 Mass. 592; Spaulding *v.* Peabody, 153 Mass. 129; Linn *v.* Chambersburg Borough, 160 Pa. St. 511; Thompson-Houston Electric Co. *v.* Newton, 42 Fed. Rep. 723; Crawfordsville *v.* Braden, 130 Ind. 149; and see *post*, c. vii.

While the electric lighting business is a public business, yet an electric light company is not a public corporation in the sense in which such term is applied to municipal corporations. Thus it has been held that an electric lighting company cannot without express statutory authority claim an exemption of its property from the ordinary mechanic's lien on the ground that it is a public corporation like a municipal corporation.[1]

§ 21. **Municipal Ownership of Electric Lighting Plants.** — The second characteristic feature of the electric lighting business is the fact that it has been in many instances undertaken by the municipal authorities as a part of the system of improvements of their municipalities. This action of the municipal authorities has raised the question of whether the furnishing of electric light for public street lighting and for lighting residences and stores is within the scope of the powers of municipal governments. The question has generally been raised on some point involving the taxation of citizens for the purpose of paying for electric lighting plants, and in this regard, as well as in other cases raising similar points, the courts have generally, though not uniformly, held that the furnishing of light in some form for street lighting is plainly within the scope of municipal powers at common law, and that it is merely a question of whether the electric light is reasonably adapted for the lighting of the municipality in question both as to efficiency of light and expense of installation; and this without any express statutory authority being given to the municipal government; and that when, as has been the case recently in many States, statutes are passed directly authorizing municipal governments to acquire and operate electric lighting plants, the statute merely limits and defines the common-law right above stated.[2] The ex-

[1] Badger Lumber Co. *v.* Marion Water Supply, Electric Light & Power Co., 48 Kan. 187.

[2] Opinion of the Justices, 150 Mass. 592; Spaulding *v.* Peabody, 153 Mass. 129; Linn *v.* Chambersburg Borough, 160 Pa. St. 511; Mauldin

tended discussion of this subject of the acquisition of electric lighting plants by municipal governments is deferred to a later chapter.[1]

§ 22. **Electric Railway a Public Use.** — That the operation of an electric railway on and over the streets and highways of a town or city or over the lands of individuals is a public use of the streets and highways and other lands is so evident as hardly to need citations. In all the cases where this point has come up the courts have held that the street railway is a form of public use of the streets which is included in the purposes and uses for which the street was originally dedicated, and the street railway, therefore, takes its position along with the telegraph and telephone and electric light as a public occupation, and the company operating it has the rights, duties, and obligations of companies carrying on such public businesses.[2] This subject is discussed at some length in the chapter on Eminent Domain,[3] in which connection the question most frequently arises.

§ 23. **Electric Railway different from Steam or Horse Railway.** — The most prominent characteristic of the electric railway in its legal relations is its intermediate position between the horse railway and the steam railway. The introduction of the horse railway as a means of public transportation over the streets and highways was not a great innovation upon the methods of travel by stage coach and

v. Greenville, 33 S. Carolina, 1; Rushville Gas. Co. *v.* Rushville, 121 Ind. 212; Crawfordsville *v.* Braden, 130 Ind. 149; State *v.* Hamilton, 47 Oh. St. 52; Thompson-Houston Electric Co. *v.* Newton, 42 Fed. Rep. 723.

[1] See *post*, c. vii.

[2] Atty.-Gen. *v.* Metropolitan R. R. Co., 125 Mass. 515; Hudson River Telephone Co. *v.* Watervliet Turnpike & Ry. Co., 135 N. Y. 393; Lockhart *v.* Craig St. Ry. Co., 139 Pa. St. 419; Briggs *v.* Lewiston & Auburn H. Ry. Co., 79 Me. 363; Jersey City & Bergen R. R. Co., *v.* Jersey City & Hoboken Horse R. R. Co., 20 N. J. Eq. 61; Taggart *v.* Newport St. Ry. Co., 16 R. I. 668.

[3] *Post*, c. v., §§ 107 *et seq.*

other horse vehicles which had long been in use, and consequently it was almost universally held, on the introduction of horse railways, that the use of the street by the horse railway for public travel was a legal use of the streets for public travel.[1] On the other hand, the steam railway, when it runs upon public highways, introduces thereon a vehicle wholly different in construction and mode of operation from any others used upon the highways, and one of a ponderous nature, difficult to control, and attended with noise and danger in passing, in addition to the permanent obstruction to the highway caused by the sleepers and raised tracks, and therefore has almost invariably been considered foreign to the legitimate uses of the highway.[2] The electric railway, however, occupies an intermediate position between these methods of transportation. There is a material difference between it and a street railway operated by horses. The electric railway not only occupies a portion of the street with its tracks like the horse railroad, but as a necessary part of its machinery, as ordinarily constructed in the overhead trolley system, has iron posts of considerable height permanently fixed in the ground along or near the curb of the pavement or sidewalk, between which are affixed permanent lines of wires crossing the street, which in turn support a longitudinal line of wire over each track of the railway.[3] Moreover, the cars of the electric road are larger in size than the ordinary horse car, are heavier, and, owing to the great speed at which they are run, are more difficult of

[1] Briggs *v.* Lewiston & Auburn H. Ry. Co., 79 Me. 363; Hiss *v.* Baltimore, etc., Ry. Co., 52 Md. 242; Koch *v* North Avenue Ry. Co., 75 Md. 222; Atty.-Gen. *v.* Metropolitan R. R. Co., 125 Mass. 515; Onset St. Ry. Co. *v.* County Commissioners, 154 Mass. 400; Jersey City & Bergen R. R. Co. *v.* Jersey City & Hoboken Horse R. R Co., 20 N. J. Eq. 61; Eichels *v.* Evansville St. Ry. Co., 78 Ind. 261.

[2] Taggart *v.* Newport St. Ry. Co., 16 R. I. 668; White *v.* Nor. W. N. C. R. R. Co., 113 N. C. 610; Pierce on Railroads, § 234.

[3] Lockhart *v.* Craig St. Ry. Co., 139 Pa. St. 419, 423.

control.[1] On the other hand the electric road differs from the steam road in many obvious particulars, such as the cars running either singly or in trains of two, the absence of smoke, and the less degree of noise attending the operation of the machinery, the kind of traffic it is intended to provide for being local rather than through or distant travel, and other particulars, although resembling the steam road somewhat in the rate of speed and difficulty of controlling the cars.[2] The electric street railway, therefore, occupies an intermediate position between the horse railway and the steam railway, and it will be seen that the courts have recognized this intermediate position by applying to it a portion of the rules applicable to horse railways, *i. e.*, allowing the electric railway to be laid in the street without additional compensation to the owners of land abutting on the street as being one of the legitimate uses of public highways,[3] and by applying also a portion of the rules applicable to steam railroads in respect to the care which people travelling along the street must use with regard to the approach and passage of the electric cars.[4]

§ 24. **Public distinguished from Municipal Corporation.** — In discussing the legal status of the above electrical businesses it has been shown that in each case the electrical business is a public occupation. It should not, however, be understood that the fact that the business is a public occupation makes

[1] Hickman *v.* Union Depot R. R. Co., 47 Mo. App. 65; Carson *v.* Federal St. & Pleasant Valley Ry. Co., 147 Pa. St. 219.

[2] Ibid.

[3] Briggs *v.* Lewiston & Auburn H. Ry. Co., 79 Me. 363; Hiss *v.* Baltimore, etc., Ry. Co., 52 Md. 242; Koch *v.* North Avenue Ry. Co., 75 Md. 222; Atty.-Gen. *v.* Metropolitan R. R. Co., 125 Mass. 515; Onset St. Ry. Co. *v.* County Commissioners, 154 Mass, 400; Jersey City & Bergen R. R. Co. *v.* Jersey City & Hoboken Horse R. R. Co., 20 N. J. Eq. 61; Eichels *v.* Evansville St. Ry. Co., 78 Ind. 261; see *post*, §§ 107 *et seq.*

[4] Hickman *v.* Union Depot R. R. Co., 47 Mo. App. 65; Carson *v.* Federal St. & Pleasant Valley Passenger Ry. Co., 147 Pa. St. 219; and see *post*, §§ 755–766.

the corporation carrying on such business a public corporation in the sense which is applied to municipal corporations. Neither the telegraph company, the telephone company, the electric light company nor the electric railway company is a public corporation in the sense in which municipal corporations are so termed.[1] It is believed that the term "public," although applied commonly only to municipal corporations, is broad enough to embrace all corporations which carry on a public business, and when meant to apply only to municipal corporations, should have that word affixed in addition.

§ 25. **Summary.** — The foregoing sections show the general characteristics of the four great divisions of electrical industries, the telegraph, telephone, electric light, and electric railway. It has been thought best to bring out these characteristics prominently at the outset of the subjects to be discussed in this work, since from them flow many important rights and obligations of these companies which will be considered in detail in the progress of the work.

[1] Badger Lumber Co. *v.* Marion Water Supply, Electric Light & Power Co., 48 Kan. 187; Cf. *post*, § 275.

CHAPTER II.

INCORPORATION.

§ 26. Incorporation.
27. Under General or Special Laws.
28. Telephone Company under Telegraph Act.
29. Electric Railways. Electric Light Companies.
30. Void Charters.
31. Special Statutes, Telegraph Companies.
32. Telegraph Companies, Number of Subscribers.
33. Articles of Association, Telegraph Companies.
34. Incorporation of Telephone Companies.
35. Incorporation of Electric Light Companies.
36. Compliance with Statutes Necessary.
37. Proof of Incorporation.

§ 26. **Incorporation.** — The application of electricity to the various purposes of modern life is principally carried on through the operations of incorporated companies, which, by reason of their large capital, are able to acquire and operate the expensive plants necessary for these purposes. The investigation of the law relating to electricity is, therefore, in a large measure the consideration of the law relating to electric corporations, and the main divisions of this book are planned with reference to this fact. The first step in the corporate existence is the incorporation of the company, and this matter will now be discussed, in so far as it has any peculiar features arising out of the distinctive character of electrical companies. The main rules relating to this subject are the same as those which apply to the incorporation of other companies, and do not require treatment in this book, as they are already covered by numerous excellent works on the general subject of corporations.

§ 27. **Under General or Special Laws.** — The first question is whether the company should be incorporated under the general corporation laws of the State, or under a special statute, or by direct grant of a charter from the legislature.

This question depends largely upon the statutes of the State in which incorporation is sought. If there is a special statute providing for the organization of telegraph companies, then incorporation must be had under and in accordance with the provisions of this special statute, and cannot be had under the general corporation laws, and the same is true of telephone and electric light and railway companies.[1] If there is no special statute applicable to the kind of corporation which it is desired to form, then the question arises whether the corporation can be formed under the general corporation laws of the State, or whether a special charter must be procured from the legislature. This question is determined by the language of the general corporation law. If this language is broad enough to include the business which the corporation is intended to carry on, whether it be telegraphy or telephony, or other electrical purposes, then the corporation can be formed under such general corporation laws without going to the legislature for a special charter, otherwise application must be made to the legislature.[2] This matter must be determined in each instance by reference to the general corporation laws of the State in question.

§ 28. **Telephone Company under Telegraph Act.** — If in any State there is a statute authorizing the formation of telegraph companies, and no statute authorizing the organization of telephone companies, a company of the latter description may be organized under the telegraph statute, for a telephone line, as has been previously seen, is held by the courts to be a telegraph line, and a company organized under a telegraph act may do a telephone business.[3] But if a special telephone

[1] State, Domestic Telegraph & Telephone Co. *v.* Newark, 49 N. J. L. 314.

[2] Doboy & Union Island Telegraph Co. *v.* De Magathias, 25 Fed. Rep. 697.

[3] *Supra*, § 13; Wisconsin Telephone Co. *v.* Oshkosh, 62 Wisc. 32; Central Pennsylvania Telephone & Supply Co. *v.* Wilkesbarre & West

act exists, corporations for carrying on that business must be formed under the special act upon the principle stated in the preceding section.[1]

§ 29. **Electric Railways. Electric Light Companies.** — Electric railways, being usually a form of street railways, are generally incorporated in the same manner as other street railways unless special statutes prescribe a different method of incorporation. Street railways cannot be organized under steam railroad acts if there is a street railway act in existence in the State.[2] In Iowa a special statute authorizing the formation of street railways inserts the words "or electric."[3] Whether an electric light or power company can be organized under a manufacturing corporations act or not has not been directly decided. In Pennsylvania it has been held that such a company is not a manufacturing company in such a sense as to be within the exemption of manufacturing companies from taxation,[4] but this decision was based on the fact that the manufacturing corporations act in that State enumerated the kinds of corporations which could be organized under its provisions, and electric light companies were not included.[5] In New York, on the other hand, the court of appeals, in a well-reasoned opinion, holds that an electric light company is in fact a manufacturing company.[6] This case was a tax exemption case, and the court said that electric light companies, by the application of skill and

Side St. Ry. Co., 11 Pa. C. C. 417; Chesapeake & Potomac Telephone Co. *v.* Baltimore & Ohio Telegraph Co., 66 Md. 399; Cumberland Telephone & Telegraph Co. *v.* United Electric Ry. Co., 42 Fed. Rep. 273.

[1] State, Domestic Telegraph & Telephone Co. *v.* Newark, 49 N. J. L. 344.

[2] Commonwealth *v.* Nor. East. El. Ry. Co., 161 Pa. St. 409.

[3] Ia. Acts 1892, c. 22.

[4] *Infra*, § 854, 855.

[5] Commonwealth *v.* Northern Electric Light & Power Co., 145 Pa. St. 105; Commonwealth *v.* Edison Electric Light Co., Ib. 131; Commonwealth *v.* Chester Electric Light & Power Co., Ib.; Commonwealth *v.* Brush Electric Light Co., Ib. 147.

[6] People, *ex rel.* Brush Electric Manuf. Co., *v.* Wemple, 129 N. Y. 543.

labor to materials that exist in a natural state, gave them a new quality or characteristic, and adapted them to a new use, and this is manufacturing.

§ 30. **Void Charters.** — Charters of incorporation proceed originally from the legislature as embodying the sovereign power of the State, and if the constitution of the State provides that a certain kind of company, *e. g.*, telegraph company, shall be organized only by the legislature, that body cannot delegate the power of granting such charter to a county court, and a charter granted by the latter body will have no validity.[1]

§ 31. **Special Statutes, Telegraph Companies.** — In California, Colorado, Florida, Indiana, Kansas, Maryland, Michigan, Missouri, Nebraska, Nevada, New Jersey, New York, Pennsylvania, and Tennessee special statutes exist prescribing certain formalities for the formation of telegraph companies.[2] In Kansas, Maryland, and Pennsylvania it is expressly provided that telegraph companies may be incorporated under the general corporation law.[3]

§ 32. **Telegraph Companies, Number of Subscribers.** — One important condition imposed by statute upon the manner of incorporating a telegraph company is a minimum number of subscribers. In Maryland there must be at least five, all citizens of the United States, or intending to become so without delay, and a majority citizens of Maryland.[4] In

[1] Doboy & Union Island Telegraph Co. *v.* De Magathias, 25 Fed. Rep. 697.

[2] Cal. Civ. Code, § 291; Col. Ann. Stat. § 587; Fla. Rev. Stat. § 2253; Ind. Ann. Stat. § 5497; Kan. Gen. Stat. § 1389; Md. Pub. Gen. Laws, Art. 23, §§ 14, 24, (cl. 11,) 222; Mich. How. Ann. Stat. § 3693; Mo. Rev. Stat § 2716; Nebr. Comp. Stat. c. 89 a, § 2; Nevada Gen. Stat. § 916; N. J. Rev. p. 1174, § 1; N. Y. Rev. Stat. (Birdseye ed.) p. 3031, § 1; Laws, 1890, c. 566, Art. 8, § 100; Pa. Bright. Purd. Dig. (12th ed.) p. 2000, § 1; Tenn. Code, § 1927. See *post*, §§ 32, 33, *et seq.*

[3] Kan. Gen. Stat. § 1389; Md. Pub. Gen. Laws, Art. 23, § 14; Pa. Bright. Purd. Dig. p. 2000, § 1.

[4] Pub. Gen. Laws, Art. 23, § 14.

Missouri also there must be not less than five.[1] In New Jersey two are enough;[2] in New York seven,[3] in Tennessee five.[4] In Colorado,[5] Indiana,[6] and Michigan,[7] it is expressly provided in the statute that any number of corporators is enough. In other States no special number is named. No special statute prescribes any number of subscribers for telephone companies, electric light or electric railway companies; but the matter is governed by the general rules applicable to the formation of corporations.

§ 33. **Articles of Association, Telegraph Companies.** — When companies are formed under general acts, the incorporation is usually effected by making out and subscribing articles of association, which are filed with the Secretary of State or other recording officer. Certain special statements are required in some States by statute in the articles of association of telegraph and telephone companies. These special statements refer to the route and termini of the lines and the manner of capitalization. In California,[8] Colorado,[9] Florida,[10] Indiana,[11] Michigan,[12] Nevada,[13] New Jersey,[14] New York,[15] Pennsylvania,[16] and Tennessee,[17] the statutes require a description of the route of the line and its termini, and in Colorado and Pennsylvania, the counties through which it runs. In California and Florida an estimate of length is necessary, and in the latter State also an affidavit of *bona fide* intention to construct.[18] The insertion of a corporate name in the articles of association is required by statutes in Indiana, Michigan, Missouri, New Jersey,

[1] Rev. Stat. § 2716.
[2] Rev. p. 1174, § 1.
[3] Laws 1890, c. 566, Art. 8, § 100.
[4] Code, § 1927.
[5] Ann. Stat. § 587.
[6] Ann. Stat. § 5197.
[7] Ann. Stat. § 3693.
[8] Civ. Code, § 291.
[9] Ann Stat. §§ 587, 632.
[10] Rev. Stat. § 2253.
[11] Ann. Stat. § 5198.
[12] Ann. Stat. § 3694.
[13] Gen. Stat. § 916.
[14] Rev. p. 1174, § 1.
[15] Laws 1890, c. 566, Art. 8, § 100.
[16] Bright. Purd. Dig. p. 2000, § 3.
[17] Code, § 1927.
[18] Sts. *supra*, & Fla. Rev. St. § 2254.

New York, and Tennessee,[1] but would naturally be inserted without such enactments. In Indiana,[2] Michigan,[3] Missouri,[4] New Jersey,[5] and New York,[6] the telegraph statutes provide that the amount of the capital stock and the shares into which it is divided, and in Indiana, Michigan, and New York the names and residences of the subscribers, must also be stated. In California, stock must have been subscribed for at the rate of $100 per mile, and ten per cent of the subscription actually paid in before the telegraph company can be incorporated,[7] and in New Jersey one-third of the stock necessary for construction must have been subscribed.[8] In Florida the shares must be $100 each in par value.[9] In Missouri the total stock must be not less than $20,000 in par value.[10] And in Tennessee,[11] the subscribers must be over twenty-one years of age. In New York the certificate must state the term of corporate existence and the names of not less than seven directors.[12] In Michigan the limit of the charter is thirty years.[13] In Indiana,[14] Michigan,[15] Missouri,[16] Nevada,[17] and New York,[18] the articles of association must be acknowledged before proper officers before filing with the Secretary of State.

§ 34. **Incorporation of Telephone Companies.** — Few special statutes relate to the incorporation of telephone companies. In Florida[19] the telegraph acts are applied to telephone companies. In Indiana a special telephone act exists,[20] which provides that the articles of association shall set forth the name, the counties or places within which the company

[1] Statutes, *supra*.
[2] Rev. Stat. § 4163.
[3] Ann. Stat. § 3694.
[4] Rev. Stat. § 2716.
[5] Rev. p. 1174, § 1.
[6] Laws, 1890, c. 566, Art. 8, § 100.
[7] Civ. Code, §§ 291, 293, 294.
[8] Rev. p. 1174, § 1.
[9] Rev. Stat. § 2255.
[10] Rev. Stat. § 2716.
[11] Code, § 1927.
[12] Laws 1890, c. 566, Art. 8, § 100.
[13] Ann. Stat. § 3694.
[14] Rev. § 4163.
[15] Ann. Stat. § 3694.
[16] Rev. Stat. § 2716.
[17] Gen. Stat. § 916.
[18] Laws 1890, c. 566, Art. 8, § 100
[19] Rev. Stat. §§ 2252-2255.
[20] Rev. Stat. §§ 5517–5529

proposes to establish, maintain, and operate telephones and telephone exchanges, the amount of capital stock, and the number of shares into which it is divided. The incorporators sign these articles, and five of them acknowledge the execution before a proper officer, and record the articles in the office of the Secretary of State. In Kansas a special statute enacts that telephone companies may be formed under the general laws for the creation of private corporations.[1] In Maryland, Missouri, and New York telephone companies are expressly included in the telegraph acts.[2] In Michigan a special telephone act exists, whereby three or more persons may organize a telephone company by signing and acknowledging articles of association which contain the name of the company, the principal place of business in the State, and the term of existence, not exceeding thirty years, the amount of its capital stock, number of shares, and amount subscribed and paid; number of directors not to be less than three, and the names of the first board.[3] In Tennessee telephone companies are chartered under the electric company act given in the next section.[4]

§ 35. **Incorporation, Electric Light Companies.** — There are few special statutes relating to the formation of electric light corporations, such companies being generally included in the general corporation laws. In Maryland[5] the telegraph statute is applied to companies "for the transaction of any business in which electricity, over or through wires, may be applied to any useful purpose," and a special section[6] includes the formation of electric light companies. In Michigan a special electric light act exists, providing that

[1] Gen. Stats. §§ 1159, 1160.

[2] Md. Pub. Gen. Laws, Art. 23, § 24; Mo. Rev. Stat. § 2716; N. Y. Laws 1890, c. 566, Art. 8, § 100.

[3] Ann. Stat. §§ 3718 a, 3718 b.

[4] Code, § 1787.

[5] Pub. Gen. Laws, Art. 23, § 24.

[6] Ibid. § 30.

not less than five persons may associate to form an electric light corporation on signing, acknowledging, and recording with the Secretary of State articles of association, stating the name of the company, the term of its existence, not exceeding thirty years, the object of the company, the amount of the capital stock, not less than $10,000 nor more than $2,500,000, the number of shares, the names of the towns, cities, villages, and counties in which the operations are to be carried on, the names of the stockholders and residences, number of shares held by each, number of directors, and the names of the first board.[1] In New York three or more persons may organize for manufacturing and using electricity for producing light, heat, or power, by signing, acknowledging, and filing a certificate with the Secretary of State, stating the name of the corporation, its objects, the amount of its capital stock, the term of its existence not exceeding fifty years, the number of shares, the board of directors not less than three nor more than thirteen, the names and places of residence of the first board, and the name of the town and county in which the operations of the company are to be carried on.[2] In Tennessee the statute provides that the charter of an electric company shall contain five subscribers over twenty-one years of age, and shall give the name of the company, the purpose, *i. e.*, manufacturing electric light, or manufacturing electric motive power, electrotyping, etc., stating fully the objects of the company and the general powers of the corporation.[3]

§ 36. **Compliance with Statutes necessary.** — It is essential to the formation of a valid corporation, that the statutory prerequisites should be substantially complied with, especially the proper filing of the articles of association,[4] but

[1] Ann. Stat. §§ 4182, 4183, 4184, 4185.

[2] Laws 1890, c. 566, Art. 6, § 60.

[3] Code, § 1787.

[4] Mokelumne Hill Mining Co. *v.* Woodbury, 14 Cal. 424; Doyle *v.* Mizner, 42 Mich. 332; Utley *v.* Union Tool Co., 11 Gray, 139.

mere informalities or immaterial variations will not render the incorporation void.[1]

§ 37. **Proof of Incorporation.** — In many States by statute, in suits by or against corporations, the fact of incorporation need not be proved unless it is specially denied by the other party. In such case an allegation by the other party that he has no knowledge or information sufficient to form a belief as to the incorporation is not enough to require proof of the incorporation.[2] In States where no such statutory provision exists, if the company was incorporated by a special act of the legislature, the act must be proved, for private acts are not judicially noticed,[3] and proof of the act of incorporation, and a certificate of the incorporation by the Secretary of State is sufficient evidence of the incorporation.[4] If the company is incorporated under a general incorporation act, this is a public law, and will be judicially noticed;[5] but the fact of incorporation must be proved, and this may be done by a certified copy of the articles of association from the Secretary of State's office, and the record books of the company showing the organization meetings, together with a certificate as to the subscription of stock, if this is a prerequisite to the incorporation of the company.[6] And after the incorporation is proved it throws the burden of proof of dissolution on the other party,[7] unless the charter

[1] People *v.* Stockton & Visalia R. R. Co., 45 Cal. 306; Walworth *v.* Brackett, 98 Mass. 98; Eastern Plank Road Co. *v.* Vaughan, 14 N. Y. 546, 551.

[2] East River Electric Light Co. *v.* Clark, 18 N. Y. S. 463.

[3] 1 Greenleaf Evid. § 5; City Council of Montgomery *v.* Montgomery, etc. Plank Road Co., 31 Ala. 76; Ohio, etc. R. R. Co. *v.* Ridge, 5 Blackf. (Ind.) 78.

[4] Dolbear *v.* American Bell Telephone Co., 126 U S. 1.

[5] 1 Greenleaf Evid. § 5; Detroit *v.* Detroit City Ry. Co., 56 Fed. Rep. 872.

[6] Toledo Electric Street Railway Co. *v.* Toledo Consolidated Street Railway Co. (Ohio), 26 Wkly. Law Bul. 172.

[7] United States El. Light Co. *v.* Leiter, 19 D. C. 575.

as proved, or the general law provides a limitation of time which has expired. If a company was incorporated under the laws of another State, whether general or special, the laws must be proved, since the courts will not judicially notice even the public laws of another State.[1]

[1] 1 Greenleaf Evid. § 5; United States Bank *v.* Stearns, 15 Wend. 314.

CHAPTER III.

FEDERAL FRANCHISE OF TELEGRAPH COMPANIES.

§ 38. Franchises or Rights of Way.
39. Federal Franchise of Telegraph Companies.
40. Telegraph Act of July 24, 1866.
41. Effect of this Act.
42. Act of Congress renders void Hostile State Legislation.
43. Act prevents exclusion from State or any Portion.
44. Act does not give Right of Way without Owner's Consent.
45. Act renders Exclusive Contracts with Railway Companies invalid.
46. Does not prevent putting Wires Underground.
§ 47. Act grants an Easement.
48. Act does not allow Telegraph to displace Electric Light Wires.
49. State Statute requiring Local Agent of Foreign Companies.
50. Acceptance of Franchise.
51. State Statutes as to Delivery of Messages.
52. State Tax Statutes.
53. Tax on Receipts from Messages.
54. Tax on Franchise.
55. Tax on Business.
56. Tax on Poles.
57. Tax on Property.
58. Summary.

§ 38. **Franchises or Rights of Way.** — Telegraph, telephone, electric light, and electric railway companies generally depend upon the use of highways and railways for the prosecution of their business, for although there are instances of telegraph lines, telephone lines, electric light plants, and electric railways which are located wholly upon private property, and are not intended for public use, especially in the case of electric light plants, yet the large majority of such companies do a public business, and for this purpose necessarily use the highways and railways for the location of their lines. It is therefore necessary for them to acquire in some way the right so to use highways and railways for these purposes.

§ 39. **Federal Franchise of Telegraph Companies.** — Before proceeding to discuss the general methods of acquiring the right to locate poles and string wires over highways and railways, the peculiar franchise granted to telegraph com-

panies by Congress,[1] which has been alluded to previously,[2] will be discussed.

§ 40. **Telegraph Act of July 24, 1866.** — By the terms of this act any telegraph company then organized, or which might thereafter be organized under the laws of any State, has the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which had been or might thereafter be declared such by law, and over, under, and across the navigable waters and streams of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads;[3] and any telegraph company organized under the laws of any State has the right to take and use from the public lands through which its lines of telegraph may pass, the necessary stone, timber, and other material for its posts, piers, stations, and other needful uses in the construction, maintenance, and operation of its lines of telegraph, and may pre-empt and use such portion of the unoccupied lands subject to pre-emption through which their lines of telegraph are located as may be necessary for their stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other.[4] The rights and privileges granted under the provisions of this act may not be transferred by any company acting thereunder to any other corporation, association, or person.[5]

Telegrams between the several departments of the government and their officers and agents, in the transmission over the lines of any telegraph company to which has been given the right of way, timber, and station lands from the public

[1] Act of July 24, 1866; U. S. R. S. §§ 5263-5269.
[2] *Supra*, §§ 11, 12.
[3] U. S. R. S. § 5263.
[4] Ibid. § 5264.
[5] Ibid. § 5265.

domain, shall have priority over all other business at such rates as the postmaster-general shall annually fix. And no part of any appropriation for the several departments of the government shall be paid to any company which neglects or refuses to transmit such telegrams in accordance with the provisions of this section.[1]

Before any telegraph company shall exercise any of the powers or privileges conferred by this law, such company shall file their written acceptance with the postmaster-general of all the restrictions and obligations required by law.[2]

§ 41. **Effect of this Act.** — The effect of this act has been discussed in a number of cases in the federal courts and in several cases in the State courts. Its effect upon the general status of the telegraph companies which accept its provisions in writing is twofold, as construed by the federal courts, as has been stated above.[3]

First. It makes them agents of the federal government for the transaction of its business.

Second. It is legislation as to the regulation of interstate commerce under the power given to Congress by the Constitution,[4] and protects the telegraph lines as means of interstate commerce as to messages sent from one State into another, for such messages are elements of interstate commerce.[5] And this construction has been acquiesced in by most of the State courts when the question has been raised,

[1] U. S. R. S. § 5266.

[2] Ibid. § 5268.

[3] *Supra*, § 11.

[4] Art. 1, § 8.

[5] Pensacola Telegraph Co. *v.* Western Union Telegraph Co., 96 U. S. 1; Western Union Telegraph Co. *v.* Texas, 105 U. S. 466; Ratterman *v.* Western Union Telegraph Co., 127 U. S. 411; Western Union Telegraph Co. *v.* Pennsylvania, 128 U. S. 39; Leloup *v.* Port of Mobile, 127 U. S. 640; Western Union Telegraph Co. *v.* State Board of Assessment of Alabama, 132 U. S. 472; St. Louis *v.* Western Union Telegraph Co., 148 U. S. 92; s. c. 149 U. S. 465; Western Union Telegraph Co. *v.* Pendleton, 122 U. S. 358; Western Union Telegraph Co. *v.* Massachusetts, 125 U. S. 530; Western Union Telegraph Co. *v.* Mayor of New York, 38 Fed. Rep. 552, 464; Western Union Telegraph Co. *v.* American Union Telegraph Co., 9

although conflicting inferences have been drawn therefrom, as will be seen later.[1]

§ 42. **Act of Congress renders void Hostile State Legislation.** — The true effect of this act has been much discussed, and the leading principle, as affirmed by the Supreme Court of the United States, and by the courts of last resort in several States, is that the act in question provides that no State legislation shall prevent the occupation of post roads for telegraph purposes by such telegraph companies as will avail themselves of the privileges of this act.[2]

§ 43. **Act prevents Exclusion from any State or any Portion of it.** — Any State legislation, therefore, which excludes any telegraph company from acquiring its right of way by proper legal proceedings in any portion of the State is repugnant to the Act of Congress and void.[3] Thus where a telegraph

Biss. 72, 390; Western Union Telegraph Co. *v.* Burlington & S. W. Ry. Co., 3 Mc Cr. 130; s. c. 11 Fed. Rep. 1; Western Union Telegraph Co. *v.* Baltimore & Ohio Telegraph Co., 19 Fed. Rep. 660; Western Union Telegraph Co. *v.* Baltimore & Ohio Telegraph Co., 22 Fed. Rep. 133; Western Union Telegraph Co. *v.* Baltimore & Ohio Telegraph Co., 23 Fed. Rep. 12; Baltimore & Ohio Telegraph Co. *v.* Western Union Telegraph Co., 24 Fed. Rep. 319; Pacific Postal Telegraph Co. *v.* Western Union Telegraph Co., 50 Fed. Rep. 493; Western Union Telegraph Co. *v.* Charleston, 56 Fed. Rep. 419; Postal Telegraph Cable Co. *v.* Charleston, Ib.

[1] San Francisco *v.* Western Union Telegraph Co., 96 Cal. 140; Commonwealth *v.* Smith, 92 Ky. 38; Port of Mobile *v.* Leloup, 76 Ala. 401; Wisconsin Telephone Co. *v.* Oshkosh, 62 Wisc. 32, 38; American Rapid Telegraph Co. *v.* Hess, 125 N. Y. 641; Chicago & Atchison Bridge Co. *v.* Pacific Mutual Telegraph Co., 36 Kan. 113; American Union Telegraph Co. *v.* Western Union Telegraph Co., 67 Ala. 26; Western Union Telegraph Co. *v.* Guernsey & Scudder El. Light Co., 46 Mo. App. 120; Western Union Telegraph Co. *v.* Bright, 20 S. E. 146; Western Union Telegraph Co. *v.* American Union Telegraph Co., 65 Ga. 160; New Orleans, etc. R. R. Co. *v.* Southern, etc. Telegraph Co., 53 Ala. 211.

[2] Pensacola Telegraph Co. *v.* Western Union Telegraph Co., 96 U. S. 1; American Telegraph & Telephone Co. *v.* Pearce, 71 Md. 535; American Rapid Telegraph Co. *v.* Hess, 125 N. Y. 641; Western Union Telegraph Co. *v.* Mayor of New York, 38 Fed. Rep. 552.

[3] Pensacola Telegraph Co. *v.* Western Union Telegraph Co., 96 U. S. 1; Western Union Telegraph Co. *v.* Atlantic, etc. Telegraph Co., 5 Nev. 102.

company had inserted in its charter a clause giving it the exclusive right to do a telegraphing business in a certain territory, which embraced a large portion of the State, and later another telegraph company sought by proper legal proceedings to acquire a right of way for its poles and lines through this territory, the Supreme Court of the United States held that the act incorporating the earlier company was, so far as it assumed to grant an exclusive territorial right, hostile legislation of the State, and void as being repugnant to the Act of Congress in question.[1] And a similar decision has been made by a State court where the incorporating act purported to give an exclusive right to the company to do a telegraphing business in the whole State.[2]

§ 44. **Act does not give Right of Way without Owner's Consent.** — It is well settled, however, that the act does not give telegraph companies the right to enter upon private property, and to locate their lines upon it, unless they acquire this right by consent of the owner or by valid legal proceedings by way of eminent domain. This construction has been asserted by the United States Supreme Court and by the Supreme Court of Maryland.[3]

§ 45. **Act renders Exclusive Contracts with Railway Companies invalid.** — A further effect of this act is that it renders void *pro tanto* any contract or agreement between a telegraph company and a railway company, whereby the railway company agrees not to allow any other telegraph company to gain a location for its poles and wires over the railway location, for the effect of such an agreement is to impair the

[1] Pensacola Telegraph Co. *v.* Western Union Telegraph Co., 96 U. S. 1.

[2] Western Union Telegraph Co. *v.* Atlantic, etc. Telegraph Co., 5 Nev. 102; see also *post*, §§ 168, 169.

[3] Pensacola Telegraph Co. *v.* Western Union Telegraph Co., 96 U. S. 1; American Telegraph & Telephone Co. *v.* Pearce, 71 Md. 535; Clausen Brewing Co. *v.* Baltimore & Ohio Telegraph Co., 2 Am. El. Cas. 214.

free exercise of the privileges granted by the Act of Congress.[1] These decisions are also supported upon the ground that such an agreement creates a monopoly, and is in restriction of trade, and is therefore void; and perhaps this is a better ground for resting them on, as the Supreme Court of the United States has as yet only announced expressly that the act in question is concerned with acts of State legislatures.[2]

§ 46. **Does not prevent putting Wires Underground.** — The act in question does not prevent State legislatures from enacting statutes requiring telegraph wires to be placed underground, for this is a mere regulation of the manner in which the telegraph company shall enjoy the privilege granted by the Act of Congress, and is a proper exercise of the police power of the State.[3] But the federal court will examine into the circumstances under which the wires are so ordered underground to satisfy itself that this act is in reality a fair and proper exercise of such police power.[4] On this point the court of appeals in New York says, "The precise scope and range of operation of these sections[5] within a State are not quite apparent, and cannot easily be defined; but this much, at least, must be true, that under them no telegraph company could interfere with the use of the streets and highways of the State, except under such regulations as are prescribed for the control of all telegraph companies

[1] Western Union Telegraph Co. *v.* American Union Telegraph Co., 9 Biss. 72, 190; Western Union Telegraph Co. *v.* Burlington & S. W. Ry. Co., 3 McCr. 130; s. c. 11 Fed. Rep. 1; Mercantile Trust Co. *v.* Atlantic & Pacific R. R. Co., 63 Fed. Rep. 513; Western Union Telegraph Co. *v.* Baltimore & Ohio Telegraph Co., 19 Fed. Rep. 660; *post*, § 170.

[2] Pensacola Telegraph Co. *v.* Western Union Telegraph Co., *supra*.

[3] American Rapid Telegraph Co. *v.* Hess, 125 N. Y 641; People, *ex rel.* N. Y. Electric Lines Co. *v.* Squire, 145 U. S. 175; Western Union Telegraph Co. *v.* Mayor of New York, 38 Fed. Rep. 552. See also *post*, § 166.

[4] Western Union Telegraph Co. *v.* Mayor of New York, *supra*.

[5] U. S. R. S., §§ 5263, 5268, 3964.

within the State, nor could such companies interfere with streets and highways in the State, so as to materially impair their usefulness as ordinary highways, nor could these congressional acts deprive the State of its control over its highways, and its right to regulate their use under the police power for the public benefit. The laws of Congress are fully satisfied by the permissive grant to the plaintiff telegraph company, of which it is perfectly feasible for it to avail itself, to place its electrical conductors in the subway constructed beneath the surface of the streets."[1] And the United States Circuit Court in the same State says, "Nevertheless persons and corporations enjoying grants and privileges from the United States, being federal agencies, and engaged in interstate commerce, are not beyond the operation of the laws of the State in which they reside or carry on their business, and it is only when these laws operate to unfairly impede them in the exercise of these federal privileges or duties, and transcend the power which each State possesses over its purely domestic affairs, whether of police or internal commerce, that they invade the national jurisdiction. . . . The statutes which the defendants are proceeding to enforce unquestionably belong to the category of police regulations, the power to establish which has been left to the individual States. But statutes of this class may sometimes trench upon the federal jurisdiction, and when their provisions extend beyond a just regulation of rights for the public good, and unreasonably abridge or burden the privilege which the national authority confers, they cease to be operative. The State, when providing by legislation for the protection of public health, public morals, or public safety, is subject to the paramount authority of the Constitution of the United States, and may not violate rights secured or guaranteed by that instrument, or interfere with the execution of the powers

[1] American Rapid Telegraph Co. *v.* Hess, 125 N. Y. 641.

confided to the general government.[1] . . . It is not apparent how the regulation proposed impairs in any just sense the privilege granted to the complainant [telegraph company] by the laws of Congress. The privilege to maintain telegraph wires over and along post roads is not to be considered so literally as to exclude regulations by the State restricting the mode of construction and maintenance which the public interest demands, but is to be construed so as to give effect to the meaning of Congress, which was to grant an easement which would afford telegraph companies all necessary franchises, and which, to that extent, should be beyond the reach of hostile legislation by the States. Thus interpreted, the grant is no more invaded when the regulations require the wires to be placed in conduits underground than it would be if they were required to be placed in conduits along the surface of the streets, and when this becomes necessary for the comfort and safety of the passengers, such a regulation is as legitimate as one would be providing that the poles should be of a uniform or designated height, or should be located at given distances apart, or at designated places along the street."[2]

§ 47. **Act grants an Easement.** — The act in question grants to the companies which accept its provisions a species of easement or right of way to set poles and string wires on post roads.[3] But this easement is not absolute; that is, it is dependent upon the consent of the owner of the land, or the condemnation thereof by such proceedings as the State laws may give,[4] and is also, as above stated, subject to such

[1] Western Union Telegraph Co. *v.* Mayor of New York, 38 Fed. Rep. 552; Mugler *v.* Kansas, 123 U. S. 623; Morgan *v.* Louisiana, 118 U. S. 462, 464.

[2] Western Union Telegraph Co. *v.* Mayor of New York, 38 Fed. Rep. 552. To the same effect, Clausen Brewing Co. *v.* Baltimore & Ohio Telegraph Co., 2 Amer. El. Cas. 216.

[3] Western Union Telegraph Co. *v.* Mayor of New York, 38 Fed. Rep. 552; Hewett *v.* Western Union Telegraph Co., 4 Mackay, 424.

[4] Pensacola Telegraph Co. *v.* Western Union Telegraph Co., 96 U. S. 1;

reasonable police regulations as the State laws may enact for protecting the safety and health of the inhabitants of the State.[1]

§ 48. **Act does not allow Telegraph to displace Electric Light Wires.** — The easement granted by the Federal Act does not authorize the telegraph company to require an electric light company to remove its poles and wires which it has already placed in the streets under due authority of the municipal government; but, on the other hand, if the telegraph company has its lines already placed in the street, an electric light company cannot place its lines so near to the telegraph wires as to interfere with the successful use of the latter for the transmission of messages.[2] Presumably the same rules hold good in regard to telephone wires and electric railway wires.[3] It may be questioned, however, whether if any of these latter lines were so placed on a post road of the United States as to render it impossible for a telegraph company to occupy the same under its federal license, the federal courts would not order the removal or modification of the interfering structure so as to allow the telegraph company to enjoy its rights under the franchise.

§ 49. **State Statute requiring Local Agent of Foreign Companies.** — Another instance of a State statute which has been upheld, at least by a State court, as being a valid exercise of the police power of the State, although placing a limitation upon the use of the federal franchise of telegraph companies, is the statute which exists in many States forbidding foreign corporations to do business within the State without having a usual place of business or agent upon whom processes in law can be served. Thus in Alabama a tele-

American Telegraph & Telephone Co. *v.* Pearce, 71 Md. 535. See *post*, ch. Eminent Domain.

[1] Western Union Telegraph Co. *v.* Mayor of New York, 38 Fed. Rep. 552.

[2] Western Union Telegraph Co. *v.* Guernsey & Scudder Light Co., 46 Mo. App. 120. See also § 223, *post*.

[3] See *post*, §§ 213–222, 223, 224.

graph company, incorporated under the laws of another State, intended to construct a telegraph line along the railway of a railroad company. It had not obtained any right of way over this railway, nor had it any property in Alabama, nor had it constructed or attempted to construct any line of telegraph in that State. It brought a bill in equity, however, to prevent the proposed obstruction of its intended building by another telegraph company, which had existing lines in the State and over the railway in question. The Supreme Court of Alabama refused to grant the injunction, holding that although the Act of Congress gave the rights which it purported to give, yet that as section 4, article 14 of the State Constitution of Alabama provided that no foreign corporations should do any business in that State without having at least one known place of business and an authorized agent or agents therein, which the complainant had not, and as this section of the Constitution was a valid exercise of the police power of the State, the complainant could not invoke the protection and preventive jurisdiction of a court of equity by the extraordinary process of injunction. The court relied also, however, upon the remote and speculative apprehension of injury which was the basis of the application.[1]

§ 50. **Acceptance of Franchise in Writing.** — The statute which creates this franchise provides that it shall be available only to such telegraph companies as shall file a written acceptance thereof with the postmaster-general, and the lack of such acceptance is a fact which may be set up in a collateral proceeding to defeat the right. Thus where a telegraph company brought proceedings to condemn a right of way for its telegraphic line over a bridge which was to be built by a bridge company across a navigable stream, the court held that while the federal statute granted the franchise on which

[1] American Union Telegraph Co. *v.* Western Union Telegraph Co., 67 Ala. 26.

the telegraph company based its right, and that this statute would override any State laws, yet the right of the plaintiff to claim the franchise was defeated by the fact that it had not filed the necessary written acceptance with the postmaster-general.[1]

§ 51. **State Statutes as to Delivery of Messages.** — The decisions in Pensacola Telegraph Company *v.* Western Union Telegraph Company,[2] and Western Union Telegraph Company *v.* Texas,[3] having established the position of the telegraph as an instrument of interstate commerce, it follows that any State statute which imposes any impediment to or attempts to regulate the operations of telegraphy between the States is unconstitutional as being opposed to the clause of the Constitution of the United States, which vests in Congress the sole power of regulating interstate commerce.[4] Thus it has been held that a statute which requires telegraph companies to deliver all despatches by a messenger to the persons to whom the same are addressed, or to their agents, on payment of any charges due for the same, provided such persons or agents reside within one mile of the telegraph station or within the city or town where such station is, places an impediment to or attempts to regulate interstate commerce so far as concerns messages delivered outside the State, and is therefore to that extent void.[5] And also that a State statute which gives preference to communications for or from officers of justice, and allows arrangements with newspapers for transmission of intelligence of general and public interest out of regular order, is, as to messages sent or delivered in other States, an attempt to regulate interstate

[1] Chicago & Atchison Bridge Co. *v.* Pacific Mutual Telegraph Co., 36 Kan. 113.

[2] 96 U. S. 1.

[3] 105 U. S. 460; see *ante*, § 41.

[4] Const., Art. 1, § 8; Western Union Telegraph Co. *v.* Pendleton, 122 U. S. 347; Butner *v.* Western Union Telegraph Co., 37 Pac. Rep. 1087.

[5] Western Union Telegraph Co. *v.* Pendleton, 122 U. S. 347; see also *post*, §§ 417, 484, 485.

commerce, and therefore unconstitutional and void.[1] The court says, "The attempted regulation by Indiana of the mode in which messages sent by telegraph companies doing business within her limits shall be delivered in other States cannot be upheld. It is an impediment to the prosecution of that form of interstate commerce which is as much beyond the power of Indiana to interpose as the imposition of a tax by the State of Texas upon every message transmitted by a telegraph company within her limits to other States was beyond her power," and proceeds to describe the conflicting legislation that would arise if such statutes were given force outside of the State which enacts them, and says that the purpose of giving the power of regulating interstate commerce to Congress was to prevent just such a conflict of State laws, and that the statute could not be supported as an exercise of the police power of the State, for such power must not encroach upon the powers of Congress as vested in it by the Constitution. When, however, the message was sent and delivered wholly in the State in which the act exists, and in which suit is brought, the constitutional question does not arise, for such a message is in no sense an element of interstate commerce, nor does the fact that the company sending it also does an interstate business alter the case.[2] Where the message is sent from without the State to a point of delivery within the State, if the statute in question is merely declaratory of the common-law duty of telegraph companies to deliver despatches promptly to the persons to whom they are addressed, it has been held in a State court that the statute is not opposed to the interstate commerce clause of the federal Constitution, even though it adds a penalty for breach of the statute, since it places no impediment in the transaction of interstate business, but merely reinforces a duty previously existing by a penalty

[1] Western Union Telegraph Co. *v.* Pendleton, *supra.*

[2] Western Union Telegraph Co. *v.* Bright, 20 S. E. Rep. 146.

for its non-performance.[1] In such cases, of course, there is no question of the extra-territorial force of the State statutes, as there is when an attempt is made to apply such a statute to a message delivered outside of the State; but it seems doubtful whether a statute which adds an arbitrary penalty to the failure to deliver a message promptly does not, in effect, regulate interstate commerce as to messages sent between States, and whether the federal courts would not hold such an act to be to that extent unconstitutional.[2] It has been decided in North Carolina that where a telegraph message is sent between two points in the same State, it is not in effect interstate commerce, although in order to reach the second of these points it is obliged to travel outside of the State line for a short distance. In this case it is held that since the telegram starts and stops in one State, the mere fact that the line over which it goes is outside of this State in one portion of its route does not render the message an interstate commerce message in such a sense that the statute which fixes the rate to be charged for sending the message from one place to the other is a regulation of interstate commerce. This decision has not been before the Supreme Court of the United States, and it might be doubted whether the decision would be upheld in that court.[3]

§ 52. **State Tax Statutes.** — The position of the telegraph as an instrument of interstate commerce and as a government agent, as well as enjoying a federal franchise under the Act of Congress above set forth, renders it exempt from any State tax which is based in any way upon the interstate or governmental business of the telegraph company. This

[1] Western Union Telegraph Co. *v.* Tyler, 18 S. E. (Va.) 280; Western Union Telegraph Co. *v.* Bright, 20 S. E. Rep. 146; Western Union Telegraph Co. *v.* James, 90 Ga. 254.

[2] Cf. Western Union Telegraph Co. *v.* Pendleton, *supra.*

[3] Railroad Commissioners *v.* Western Union Telegraph Co., 113 N. C. 213.

subject is considered at length in the chapter on Taxation,[1] and it is sufficient to give in this place only a summary account of the results.

§ 53. **Tax on Receipts from Messages.** — In many States there have been enacted statutes which tax telegraph companies upon the receipts of the company from the transmission of messages. It is clear that so far as their receipts are from messages sent from one State into another, such a tax is a tax on interstate commerce, and so far as their receipts are from government messages, such a tax is a tax upon the doings of the federal government. It has therefore been held by the federal courts that such a tax is unconstitutional and void as to government messages and as to any other messages except those sent and delivered wholly within the State. If the receipts of the several classes can be separated, the tax will be sustained as to State messages and avoided as to the others.[2]

§ 54. **Tax on Franchise.** — For similar reasons a tax upon the franchise of a telegraph company granted to it by the Act of Congress above referred to cannot be taxed, for it is a grant made by the federal government for the purpose of expediting interstate commerce, and for government messages.[3] But a tax upon the franchise of a telegraph company to be a corporation with usual corporate powers, or upon its capital stock, as indicating its corporate franchise, is not obnoxious to the provisions of the federal constitution, and is within the power of the State government which grants the franchise.[4]

[1] *Post*, §§ 817–842.

[2] Western Union Telegraph Co. *v.* Texas, 105 U. S. 460; Ratterman *v.* Western Union Telegraph Co., 127 U. S. 411; Leloup *v.* Port of Mobile, 127 U. S. 640; Western Union Telegraph Co. *v.* Pennsylvania, 128 U. S. 39; Western Union Telegraph Co. *v.* Alabama State Board of Assessment, 132 U. S. 472; *post*, §§ 819–824.

[3] San Francisco *v.* Western Union Telegraph Co., 96 Cal. 140.

[4] Western Union Telegraph Co. *v.* Atty.-Gen. of Massachusetts, 125 U. S. 530; *post*, §§ 834–842.

§ 55. **Tax on Business.** — Any tax which is imposed on the total business of a telegraph company doing an interstate or governmental business is unconstitutional for the above reasons unless it excepts the two classes of business above stated, in which case it is valid; and this is true whether the tax be in the form of a license for the privilege of doing business, or a tax on the business done, or a tax on the mileage of the telegraph company as a measure of its business.[1]

§ 56. **Tax on Poles.** — A tax which is imposed on a telegraph company by the number of its poles placed in the streets is not a tax on the federal franchise when it appears that the tax is a reasonable rental of the portion of the streets occupied by the poles, for the Act of Congress does not assume to allow the taking of private property by any telegraph company without compensation, and therefore the tax may be sustained on the ground of a reasonable rental.[2] So when the tax on poles is shown to be a remuneration to the city authorities for the care and supervision of the poles and wires, in the exercise of the police power of the city, and for the safety and health of the inhabitants, it is not invalid, provided the remuneration so given is a reasonable one, having regard to the cost and expense of the care so bestowed, for this, again, like ordering the wires underground, is merely a proper limitation of the use of the federal franchise.[3]

[1] Postal Telegraph Cable Co. *v.* City Council of Charleston, 153 U. S. 692; s. c. 56 Fed. Rep. 419; Leloup *v.* Port of Mobile, 127 U. S. 640; Commonwealth *v.* Smith, 92 Ky. 38; Western Union Telegraph Co. *v.* City Council of Charleston, 56 Fed. Rep. 419; *post*, § 826.

[2] St. Louis *v.* Western Union Telegraph Co., 149 U. S. 465; s. c. 39 Fed. Rep. 59.

[3] Allentown *v.* Western Union Telegraph Co., 148 Pa. St. 117; Chester *v.* Philadelphia, Reading & P. Telegraph Co., Ib. 120; Western Union Telegraph Co. *v.* Philadelphia, 12 Atl. Rep. 144; Philadelphia *v.* Postal Telegraph Cable Co., 67 Hun (N. Y.) 21; Philadelphia *v.* Western Union Telegraph Co., 40 Fed. Rep. 615; New Orleans *v.* Great Southern Telephone, etc. Co., 40 La. An. 41; *post*, § 833.

§ 57. **Tax on Property.** — Any tax which is directly laid on the tangible property of a telegraph company within the State which levies the tax is valid and constitutional, and not subject to any of the objections arising out of the federal franchise or the interstate or governmental business of the telegraph company, for the telegraph company, as to such property, enjoys the protection of the State laws, just as any corporation does, and should pay for this protection.[1]

§ 58. **Summary.** — The effect of the above decisions seems to be that the telegraph company, having accepted the Act of Congress, cannot be excluded from any State or portion thereof, nor can it be impeded in the exercise of its federal franchise, but it cannot take private property therefore without compensation; that it is in some points subject to the police and tax powers of a State just as any other corporations, and that a federal court will always look into the real facts of the case and see that these principles are carried out.

[1] Western Union Telegraph Co. *v.* Atty.-Gen. of Massachusetts, 125 U. S. 530; Railroad Co. *v.* Peniston, 18 Wall. 5; People *v.* Gold & Stock Telegraph Co., 98 N. Y. 67; People, *ex rel.* Western Union Telegraph Co. *v.* Dolan, 126 N. Y. 166.

CHAPTER IV.

FRANCHISES OR RIGHTS OF WAY, STATE STATUTES.

§ 59. Necessity of Franchise or Right of Way.
60. Right to grant Franchise belongs to Legislature.
61. State Franchise for Telegraph Line over Highways and Waters.
62. Right of Way on Railroads, State Statutes.
63. Right of Way over Private Lands, State Statutes.
64. Statutes do not authorize Bridges.
65. Acquisition of Right of Way by Purchase, Statutes.
66. Eminent Domain, State Statutes.
67. Right of Eminent Domain conferred by Statute.
68. States where no Eminent Domain Statutes.
69. Eminent Domain Statute, Alabama.
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71. Eminent Domain Statute, California.
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73. Eminent Domain Statutes, Florida, Georgia.
74. Eminent Domain Statutes, Illinois, Indiana, Iowa.
75. Eminent Domain Statutes, Kansas, Louisiana, Maryland.
76. Eminent Domain Statute, Michigan.
§ 77. Eminent Domain Statutes, Mississippi, Missouri.
78. Eminent Domain Statutes, Nevada, New York.
79. Eminent Domain Statutes, North Carolina, Ohio.
80. Eminent Domain Statutes, Oregon, Tennessee, Texas.
81. Eminent Domain Statutes, Virginia, Washington, Wyoming.
82. Telephone Franchise, State Statutes.
83. Electric Light Franchise, State Statutes.
84. Electric Railway, State Statutes.
85. Consent of Municipal Authorities.
86. Statutes against Prescription.
87. Connecticut: Telegraph, Telephone, Electric Light or Power.
88. Illinois: Telegraph and Telephone.
89. Maine: Electric Wires.
90. Massachusetts: Telegraph.
91. Michigan: Electric Wires.
92. New Hampshire: Telegraph and other Wires.
93. New Jersey. Telegraph and other Wires.
94. New York: Electric Wires.
95. Pennsylvania: Electric Wires.
96. Rhode Island: Telegraph and other Wires.
97. Vermont: Telegraph Posts and Wires.

§ 59. **Necessity of Franchises or Rights of Way.** — Electric companies are in almost every case, as was said previously,[1] compelled to use public highways for the transaction of their business. It is true that in some instances small electric

[1] *Supra*, § 38.

railways are operated wholly upon private grounds, as, for instance, tramways in mines and tramways on manufacturing premises for the transportation of freight. There are also many isolated electric light plants for lighting single manufactories or large business houses, and there are also instances of telephone and telegraph lines on private premises; but by far the larger proportion of all companies doing any of the above businesses require a right of way over public highways. This right consists of a right to set their poles and string their wires, and maintain the same on and over public highways.

§ 60. **Right to grant Franchises belongs to Legislature.** — The power to grant the right to construct and maintain, upon, along, and over a public highway, such structures as are necessary for the operation of telegraph, telephone, electric light and electric railway plants resides in the first instance in the legislature of the State, in which body is vested the general right of travel of the public over public highways, which right is necessarily somewhat abridged by such structures.[1] This principle was well expressed by Mr. Chief Justice Gibson in a case in Pennsylvania, as follows: —

"To the Commonwealth here, as to the King in England, belongs the franchise in every highway as a trustee for the public."[2] In most instances, however, as will be seen later,[3] the legislatures have delegated to the municipal authorities the right to grant such franchises within the limits of their municipalities because the various matters of detail, such as the number of poles, their size, height, etc., their position on the highway, the number of wires to be strung,

[1] Atty.-Gen. *v.* Metropolitan Railroad Co., 125 Mass. 515, 517; Commonwealth *v.* Temple, 14 Gray, 69; Fanning *v.* Osborne, 102 N. Y. 441, 447; O'Connor *v.* Pittsburg, 18 Pa. St. 187, 189; Saginaw Gas Light Co. *v.* Saginaw, 28 Fed. Rep. 529; Citizens St. Ry. Co. *v.* City Ry. Co., 56 Fed. Rep. 746.

[2] O'Connor *v.* Pittsburg, 18 Pa. St. 187, 189.

[3] *Post*, chap. vi.

etc., are clearly germane to the usual powers given to municipal authorities to regulate and control the use of the streets within their limits. The manner in which this delegation of authority is made, and the amount of discretion on this subject given by the legislature to the municipal authorities vary largely in different States and as to different companies; for instance, in case of telegraph companies, owing to the Act of Congress above considered,[1] the State legislature cannot pass any law restricting the enjoyment by telegraph companies of their federal franchise over post roads; and therefore, in most instances, the State legislatures, by direct statute, grant a similar franchise to telegraph companies, and grant to the municipal authorities at most only the right to designate the location of the poles on the highways, their size, form, etc., while in the case of other electric companies the State legislature sometimes, either by charter or general laws, gives an absolute right to the company to set its poles and string its wires along public highways, subject only to regulation by the municipal authorities as to location, etc., and sometimes leaves it discretionary in the municipal authorities to grant or refuse such a right altogether.

§ 61. **State Franchise for Telegraph Line over Highways and Waters.** — Conformably to the Act of Congress above referred to, the State legislatures of almost every State have enacted statutes granting telegraph companies the right of construction and operation of their lines upon the highways of the State. The phraseology of the statutes varies considerably; but the grant is substantially a right to construct a line or lines of telegraph on or along any of the public roads and highways, or generally across any of the waters within the limits of the State, by the erection of the necessary fixtures, including posts, piers, or abutments for sustaining the wires, provided the same shall not be so constructed as to incommode

[1] *Supra*, chap. iii.

the public use of the roads or highways or injuriously interrupt the navigation of said waters.[1] If a telegraph company constructs its line along and across a bridge over a navigable stream, in which there is a draw, it must so arrange its lines of telegraph as not to interfere with the opening and closing of the draw nor the passage of vessels through. Any proposed construction which interferes with navigation will be enjoined by a court of equity.[2] This main provision of the statute is sometimes added to or qualified by various subsidiary provisions, which will be considered in the following sections.

§ 62. **Right of Way on Railroads, State Statutes.** — It will be noticed that the grant of right of way, as stated in the foregoing section, specifies only public roads and highways and waters as the localities along and over which telegraph lines are to be constructed. In many States a further provision is made by statute, including railroad lines among the localities over which the telegraph right of way may extend, and in such case it is usual to add also that the

[1] Ala. Const. Art. 14, § 11; Code, § 1652; Stats. 1890, No. 5: Ark. Dig. 6422; Acts 1885, Act 107, § 1: Cal. Civ. Code, § 536: Col. Ann. Stat. §§ 588, 591: Conn. Gen. Stat. § 3944: Fla. Rev. Stat. §§ 2252, 2256, 2257: Ga. Laws 1889, No. 672, § 1: Ill. Ann. Stat. ch. 134, par. 2: Ind. Annot. Stat. [Ed. 1894], § 5501: Ia., McC. Ann. Code, §§ 2103, 2104: Kan. Gen. Stat. § 1383: Ky. Const. § 199: La. Rev. Stat. § 696; Acts 1880, No. 124: Me. Acts 1885, c. 378, § 2: Md. (and postal routes), Pub. Gen. Laws, Art. 23, § 221: Mass. Pub. Stat., ch. 109, § 2: Mich. Howell's Ann. Stat. §§ 3686, 3697: Minn. G. S. 1894, § 2641: Miss. Ann. Code, § 851: Mo. Rev. Stat. § 2721: Neb. Comp. Stat. ch. 89 a, § 14: Nev. Gen. Stat. § 917: N. H. Pub. Stat. ch. 81, § 1: N. J. Rev. p. 1175, § 8: N. Y. Laws 1890, c. 566, Art. 8, § 102: N. C. Code, § 2007: Ohio Rev. Stat., Smith & Benn., § 8035, cl. 227: Oreg. Hill's Annot. Laws, §§ 4160, 4161: Pa. Bright. Purd. Dig., p. 1628, § 6: Tenn. Code, §§ 1535, 1536, 1928; Code Suppl. Shannon, p. 134, § 1: Tex. Sayles Annot. Stat. Art. 622: Vt. Rev. Laws, § 3633; Laws 1888, No. 32: Va. Code, § 1287: Wash. Hill's Stats. & Codes, § 1561: Wisc. San. & Berr. Ann. Stat., 1778.

[2] Pacific Mutual Telegraph Co. *v.* Chicago & Atchison Bridge Co , 36 Kan. 118; and see also *post*, §§ 273, 274.

construction must be such as not to interfere with the usual operation of the railroad.[1] In other States the right to construct lines of telegraph is extended so as to include the lands of any and all corporations.[2] In the two latter States the statutes provide that the use by the telegraph company must not interfere with the use of the corporation to whom the lands belong.[3]

§ 63. **Right over Private Lands, State Statutes.** — In still other States the statutes extend the right of way of telegraph companies over lands owned by private individuals.[4] In Ohio and Missouri this right is limited so as not to allow the occupation of buildings or dwellings by the telegraph company, and in the former State no pole can be set in the yard of a building unless absolutely necessary.[5] And in New Hampshire it is provided that the poles must be so set as not to interfere with any private way leading to land or buildings, or with the use of the land and building.[6] In

[1] Ala. Code, § 1652; Ark. Acts 1885, ch. 107, § 1; Col. Ann. Stats. § 591; Fla. Rev. Stat. § 2257; Ga. Laws 1889, c. 276, § 1; Ill. Ann. Stat. ch. 134, par. 2; La. Acts 1880, No. 124; Me. Acts 1885, ch. 378, § 13; Mich. Howell's Ann. Stat. § 3686; Miss. Ann. Code, § 854; N. C. Code, § 2007; Ohio Rev. Stat., Smith & Benn., § 3459; Tenn. Code Suppl. Shannon, p. 134, § 1; Vt. Rev. Stat. §§ 3638, 3639; Va. Code, § 1287.

[2] Ala. Code, § 1654; Kan. Gen. Stats. § 1384; La. Acts 1880, No. 124; Mo. Rev. Stats. § 2722; Ohio, Rev. Stat., Smith & Benn., §§ 3458, 3468, 3469.

[3] Ohio Rev. Stat., Smith & Benn., §§ 3458, 3468, 3469; Mo. Rev. Stats. § 2741.

[4] Ala. Code, § 1654; Ark. Act 1885, ch. 107, § 1; Cal. Civ. Code, § 536; Col. Ann. Stat. § 593; Ga. Laws, 1889, ch. 276, § 1; Ill. Ann. Stat. ch. 134, par. 2; Ia. McC. Ann. Code, § 2103; Kan. Gen. Stats. § 1384; La. Laws 1880, No. 124; Mich. Howell's Ann. Stat. § 3686; Mo. Rev. Stat. § 2722; Nev. Gen. Stat. § 920; 3 N. Y. Rev. Stat., Birdseye ed., p. 3034, § 14; Laws 1890, ch. 566, Art. 8, § 102; N. C. Code, § 2009; Ohio Rev. Stat., Smith & Benn., § 3456; Oreg. Hill's Ann. Laws, § 4160; Tenn. Code, § 1535; Shannon's Code Suppl. p. 134, § 1; Tex. Sayles' Ann. Stat. Art. 623; Va. Code, § 1288; Wash. Hill's Stats. & Codes, § 1548.

[5] Mo. Rev. Stat. § 2740; Ohio Rev. Stat., Smith & Benn., § 3457.

[6] N. H. Pub. Stat. ch. 81, § 4.

still other States the statutes extend the telegraph company's right of way so as to include a way over the public or State lands.[1]

§ 64. **Statutes do not authorize Bridges.** — Owing to the broad scope of the language used in some statutes authorizing telegraph companies in the construction of their lines to erect posts, piers, and abutments for supporting the wires over streams and waters, it has been deemed necessary in some States to enact that these statutes shall not be so construed as to authorize the construction of any bridge across any of the waters of the State.[2]

§ 65. **Acquisition of Right of Way by Purchase, Statutes.** — It is evident that where the statutes authorize telegraph lines to be run over private or corporate lands or over the right of way of railroads or over public highways (except in those States in which a telegraph line is not considered an additional servitude on the highways, as will be seen hereafter)[3] the construction of the telegraph line upon these lands, railways, and highways involves an encroachment upon the rights of the owners, *pro tanto*, and therefore a taking of private property for the use of the telegraph. In order to effect this, there must be a power in the telegraph company to contract with the owner of the land for the purchase of the right, if it is to be acquired by purchase, and this power has been expressly given by statute in a few States.[4] This power would probably be implied from the

[1] Ark. Acts 1885, ch. 107, § 1; Ga. Laws 1889, ch. 276, § 1; Ia. McC. Ann. Code, § 2103; La. Rev. Stat. § 696, Acts 1880, No. 124; Mich. How. Ann. Stat. § 3686; Miss. Ann. Code, § 854; Tenn. Code Suppl. Shannon, p. 134, § 1.

[2] Conn. Gen. Stat. § 3944; Ga. Laws 1889, ch. 672, § 1; Md. Pub. Gen. Laws, Art. 23, § 224; Mass. Pub. Stat. ch. 109, § 2; Mich. How. Ann. Stat. § 3697; N. Y. 3 Rev. Stat. Birdseye ed., p. 3032, § 5.

[3] *Post*, § 116.

[4] Ala. Code, § 1653; Col. Ann. Stat. § 592; Ga. Acts 1889, ch. 276, § 2; N. C. Code, § 2008; Oreg. Hill's Annot. Stat. § 4161; Va. Code, § 1288.

existence of the right, which subject will be discussed later in the chapter on Eminent Domain.

§ 66. **Eminent Domain, State Statutes.** — It is further evident that in case the owner of the lands, railways, or soil under the railways or highways, refuses to consent to the construction of the telegraph line thereupon or to sell the right of construction, the State statutes giving telegraph companies the right to construct their lines over private property would be unconstitutional unless they were supplemented by provisions conferring upon telegraph companies the right of eminent domain for the purpose of construction of their lines; that is, the right to take the private property necessary for this purpose upon making due compensation therefor to the owner thereof; and accordingly in most States, in some form or another, this right is granted by statute to telegraph companies. The construction and effect of these statutes will be discussed later in the chapter on Eminent Domain.[1] The purpose at present is merely to give the statutory provisions on this subject.

§ 67. **Eminent Domain conferred by Statute.** — By examining the statutes cited in the note below it will be found that in all the United States, with a few exceptions, which will be noted later, the legislatures have granted telegraph companies the right to extend their lines over private lands, and generally over the right of way of railroads, and have coupled with this grant the right to acquire this location for their lines by condemnation proceedings or right of eminent domain, in case the owner of the property refuses to sell the right or to consent to the construction gratuitously.[2] The

[1] *Post*, ch. v.

[2] Ala. Code, §§ 1652, 1653, 1654; Ark. Acts 1885, ch. 107, §§ 1–3; Cal. Stats. 1893, ch. 130; Col. Ann. Stat. §§ 591–594; Fla. Rev. Stat. § 2257 (Railroads only); Ga. Laws 1889, No. 276, § 1; Ill. Ann. Stat. ch. 134, ¶¶ 2, 3; Ind. Annot. Stat. [Ed. 1894] § 5501; Ia. McC. Ann. Code, §§ 2103, 2105; Kan. Gen. Stat., §§ 1383, 1384; La. Acts 1880, No. 124; Md. Acts 1886, ch. 161, § 2; Mich. How. Ann. Stat. §§ 3686, 3697,

general scope and substance of these statutes is the same in all States, and provides for an application by the company to some designated court or other tribunal for the appraisal, either directly by the court or through commissioners, of the value of the right which is to be thus appropriated, or the damage to the person owning the property upon which the right is to be exercised, and the value or damage being thus ascertained, and the amount thereof paid or tendered by the telegraph company, the right of construction vests at once in that company.

§ 68. **States where no Eminent Domain Statutes.** — In a few States where telegraph companies are not empowered to extend their lines over private property, and where the placing of lines upon the highways is not considered an additional servitude,[1] as will be seen hereafter, the right of eminent domain is unnecessary. Thus in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont, telegraph lines are only allowed to be placed upon highways, and no statutes conferring the right of eminent domain upon these companies exist.[2] But in these States the statutes provide for damages to be assessed for the owners of adjoining land, these damages to be ascertained generally by the selectmen of the town on petition and hearing.[3] In New Jersey also the telegraph lines are limited to the highways,

3698; Miss. (Railroads only) Ann. Code, §§ 851, 856; Mo. Rev. Stat. § 2722; Nev. Gen. Stats. §§ 917, 920, 921; N. Y. Laws 1890, c. 566, Art. 8, § 102; N. C. Code, §§ 2007–2010; Ohio Rev. Stat., Smith & Benn., §§ 3456–3461, 3468, 3469, 8035, cl. 228; Oregon, Hill's Ann. Laws, §§ 4160, 4162–4164; Tenn. Code, 1535, 1538, 1928; Code Suppl., Shannon, p. 131, §§ 1–4; Tex. Sayles' Annot. Stat., Art. 623; Vt. (Railroads only) Rev. Laws, § 3638; Va. Code, §§ 1287–1290; Wash. Hill's Stats. & Codes, §§ 1517–1549, 1561; Wyoming, Rev. Stat. § 548.

[1] *Post*, § 116.

[2] Conn. Gen. Stat. § 3944; Me. (except Railroads), Acts 1885, ch 378; Mass. Pub. Stat. ch. 109, Acts 1884, ch. 306; N. H. Pub. Stat. ch. 81; R. I. Pub. Stat. ch. 242, § 48; Vt. Rev. Laws, §§ 3633 *et seq.*

[3] See statutes, *supra*, § 68, note.

and even there depend upon the consent of the adjoining landowners; but if this consent is withheld the telegraph company may, by application to the Circuit Court, have the damages of the landowner assessed, and thereupon is entitled to construct the line on the highway.[1] In Pennsylvania a similar system of statutes exists, whereby telegraph lines are limited to the highways, but persons injured by the construction thereof may have their damages assessed by a petition to the Court of Common Pleas of the county and the appointment of appraisers.[2] In Kentucky, Minnesota, Nebraska, and Wisconsin also no statutes conferring the right of eminent domain exist. Proceeding now to a more detailed account of the statutory provisions concerning this right of condemning a right of way for the telegraph, we find: —

§ 69. **Eminent Domain Statute, Alabama.** — In this State the statute provides that a telegraph company shall be entitled to the right of way over the lands, franchises, and easements of other persons and corporations, and the right to erect poles and establish offices upon making just compensation, as now provided by law.[3]

§ 70. **Eminent Domain Statute, Arkansas.** — In this State by statute, if the right of way cannot be secured by consent, contract, or agreement, the telegraph company has the right to condemn the property, lands, rights, privileges, and easements, in the same way as railroads.[4]

§ 71. **Eminent Domain Statute, California.** — In this State it is simply provided that the right of eminent domain may be exercised by telegraph companies.[5]

§ 72. **Eminent Domain Statute, Colorado.** — In this State

[1] Rev. p. 1175, § 8; p. 1022, § 2; Laws 1887, p. 119, ch. 87; Laws 1888, p. 548, ch. 337; Laws 1890, p. 489, ch. 298.

[2] Bright. Purd. Dig. p. 1628, § 7; Laws 1891, No. 168.

[3] Ala. Code, § 1654.

[4] Acts 1885, ch. 107, §§ 1-3.

[5] Stats. 1893, ch. 130.

the statute provides that the right of way may be acquired in the manner provided by law for the exercise of the right of eminent domain.[1]

§ 73. **Eminent Domain Statutes, Florida, Georgia.** — In Florida the right is conditioned upon making just compensation to the owners of the easement if required.[2] In Georgia the telegraph company selects one commissioner, the owner of the land another, and the two thus selected choose a third, and these three, or a majority of them, award the damages to be paid by the telegraph company. This award is returned to the Superior Court of the county, and may be made a judgment of the court upon which execution may issue.[3]

§ 74. **Eminent Domain Statutes, Illinois, Indiana, Iowa.** — In Illinois the statute provides that the compensation for taking or damaging any property shall be ascertained and made in the manner which may be at that time provided by law for the exercise of the right of eminent domain.[4] In Indiana the right of way may be acquired under the writ of assessment of damages.[5] In Iowa the compensation is to be ascertained in the manner provided for taking private property for works of internal improvement.[6]

§ 75. **Eminent Domain Statutes, Kansas, Louisiana, Maryland.** — In Kansas the statute provides that the land may be condemned for the use of the company in the manner provided by law in case of railway corporations.[7] In Louisiana it is provided by statute that if the company cannot obtain the right by consent, contract, or agreement, upon just and reasonable terms, then such companies may expropriate the same as provided relative to railroads and other works of

[1] Ann. Stat. § 594.
[2] Rev. Stat. § 2257.
[3] Code, § 3024; Laws 1889, No. 276, § 3.
[4] Ann. Stat. ch. 134, ¶ 3.
[5] Annot. Stat. § 5501.
[6] McC. Ann. Code, § 2105.
[7] Gen. Stat. §§ 1384, 1397.

public utility.[1] In Maryland the company is given the right to acquire by condemnation any easements or interests in land which may be necessary to give effect to the purposes for which such corporation was formed, in the manner set forth in Sections 170 to 175 of the Corporations Act.[2]

§ 76. **Eminent Domain Statute, Michigan.** — In Michigan the statute provides that a person who feels himself aggrieved or damaged by the construction of a line may apply to the Circuit Court of the county in which his lands are, and this court will appoint three commissioners, who will make a just and equitable appraisal of the damages, and return it to the clerk of the court, which will thereupon be confirmed by the court on notice and hearing of all parties in interest.[3]

§ 77. **Eminent Domain Statutes, Mississippi, Missouri.** — In Mississippi the statute gives telegraph companies the right of eminent domain, as provided in the chapter of the statutes on that subject.[4] In Missouri, in case of disagreement as to proper compensation for the right of way, or in case of unknown, incapable, and non-resident owners, the telegraph company may apply to the Circuit Court by petition setting forth the necessary facts, to which petition the owners of the land are made parties and notified by summons of a hearing, either by personal service or by publication, and thereupon three commissioners, freeholders, and residents of the county, are appointed, who assess the damages, and return the same to the court, and payment to the clerk in behalf of the landowner vests the right of way in the telegraph company. This report of the commissioners may be reviewed by the court or a new appraisement ordered, but such review does not hinder the telegraph company from construction.[5]

[1] Acts 1880, No. 124.
[2] Acts 1886, ch. 161.
[3] Howell's Ann. Stat. §§ 3698, 3711, 3712.
[4] Ann. Code, § 858.
[5] Rev. Stats. §§ 2734–2740.

§ 78. **Eminent Domain Statutes, Nevada, New York.** — In Nevada, when the lands cannot be obtained by consent of the owner, so much as is necessary for the construction may be appropriated after making compensation therefor as follows: the telegraph company appoints one appraiser, the owner appoints one, and these two select a third, who appraise the compensation, and if the telegraph company tenders the appraised value, it may construct and maintain its line over the lands, but must keep the line in good repair on penalty of forfeiting the right.[1] In New York the telegraph company may construct its line over private lands, subject to the right of the owner thereof to full compensation under the condemnation law in case the owners cannot agree.[2]

§ 79. **Eminent Domain Statutes, North Carolina, Ohio.** — In North Carolina, when the telegraph company cannot secure its right of way by purchase, it may file a petition before the Superior Court of the county setting forth the necessary facts, and making the landowner defendant, and thus obtain condemnation of the right of way upon paying the compensation ordered by the court.[3] In Ohio the right of appropriation of lands of a corporation is limited to such use as will not interfere with the practical uses of the company owning the land, and one telegraph company cannot put its lines so near another one as to interfere mechanically with its practical working, and in case of a telegraph line on a railroad the line must be within five feet of the outer limits of the right of way, unless this is impracticable, and in case of use of streets, the manner of use must be regulated by the municipal authorities.[4] And any person aggrieved or damaged by the construction may apply to the county com-

[1] Gen. Stat. §§ 920, 921.
[2] Laws 1890, c. 566, Art. 8, § 102.
[3] Code, §§ 2009, 2010.
[4] Rev. Stats., Smith & Benn., §§ 3456–3461, 3468, 3469.

missioners within three months to appoint three appraisers, who shall appraise the damages, which shall be paid to the owner.[1]

§ 80. **Eminent Domain Statutes, Oregon, Tennessee, Texas.** — In Oregon, unless the line is placed on the land by contract, the owner must be paid damages therefor, to be estimated in case of disagreement by three appraisers, one selected by each party, and the third by the two so chosen. Their award is to be be filed in the office of the county clerk.[2] In Tennessee the lines cannot be set on the lands of an individual unless by contract, without paying him for the damages sustained, and in case of disagreement the amount is to be settled in the manner provided for taking property for public use.[3] In Texas the company is given the right to appropriate lands for its lines, and may obtain the right of way by condemnation in the manner provided for railway companies.[4]

§ 81. **Eminent Domain Statutes, Virginia, Washington, Wyoming.** — In Virginia, if the company cannot agree on the terms of purchase of the right, the company shall be entitled to the right of way on making compensation, which is to be ascertained in the manner provided for the acquisition of lands by a company incorporated for a work of internal improvement.[5] In Washington the company can appropriate lands for its line over land of individuals or railway companies.[6] In Wyoming, if the company does not acquire its right by gift or purchase, it may present to the district judge a petition setting forth the necessary facts, and praying the appointment of three appraisers, and after notice to the owners of the land, the court appoints appraisers, who

[1] Rev. Stats., Smith & Benn., § 8035, cl. 227.
[2] Hill's Annot. Laws, §§ 4160–4164.
[3] Code, §§ 1536, 1537, 1538, 1928; Suppl. Shannon, p. 134, §§ 1–3.
[4] Sayles' Annot. Stat. Art. 623.
[5] Code, §§ 1287–1290.
[6] Hill's Stats. & Codes, §§ 1547–1549.

ascertain the proper compensation and damages for the taking of the land, and certify it to the registry of deeds, and the district judge, on proof of the certificate and payment of the sums awarded, or their deposit in the county treasury, enters in the minutes of the court a rule describing the lands taken which shall be copied in the registry of deeds. Thereupon the corporation takes the fee of the lands.[1]

§ 82. **Telephone Franchises, State Statutes.** — Owing to the fact that, being considered telegraph companies, telephone companies are entitled to the benefit of telegraph statutes relating to franchises,[2] there have been few express enactments of separate telephone acts relating to the setting of telephone poles and the stringing of their wires in the highways. In Arkansas,[3] California,[4] Colorado,[5] Connecticut,[6] Florida,[7] Iowa,[8] Kansas,[9] Kentucky,[10] Louisiana,[11] Maine,[12] Maryland,[13] Massachusetts,[14] Minnesota,[15] Missouri,[16] Nebraska,[17] New Hampshire,[18] New Jersey,[19] New York,[20] Pennsylvania,[21] Rhode Island,[22] Tennessee,[23] Vermont,[24] Virginia,[25] Washington,[26] telephone companies are included by name in the telegraph statutes, and are therefore subject to all the provisions

[1] Rev. Stat. § 548.
[2] *Supra*, §§ 13–18.
[3] Acts 1885, Act 107, § 1.
[4] Stats. 1893, ch. 204.
[5] Ann. Stat. § 591.
[6] Gen. Stat. § 3944.
[7] Rev. Stats. §§ 2252, 2256, 2257.
[8] McC. Ann. Code, §§ 2103, 2105, 725, 896.
[9] Gen. Stats. § 555, cl. 22.
[10] Const. §§ 163, 199.
[11] Acts 1880, No. 124.
[12] Acts 1885, ch. 378.
[13] Acts 1886, ch. 161.
[14] Pub. Stat. ch. 109, Acts 1884, ch. 306, Act 1889, ch. 434.
[15] G. S. 1894, § 2641.
[16] Rev. Stats. §§ 2721 *et seq.*
[17] Comp. Stat. ch. 89 a, § 14.
[18] Pub. Stats. ch. 81.
[19] Rev. Supp. p. 1022, §§ 1 *et seq.*
[20] Laws 1890, ch. 566, Art. 8, § 102.
[21] Bright. Purd. Dig. p. 1628, § 4, Suppl. p. 2406, Laws 1891, No. 168.
[22] Pub. Stats. ch. 242, § 48.
[23] Code Suppl., Shannon, p. 134, § 1.
[24] Laws 1884, No. 47, No. 23, No. 114; Laws 1882, No. 74.
[25] Code, §§ 1287 *et seq.*
[26] Hill's Stats. & Codes, §§ 1547 *et seq.*, 1561.

thereof, for a fuller statement of which, see the preceding sections.[1] In Indiana a separate telephone act exists, which, so far as franchises are concerned, gives to telephone companies the power to acquire, by purchase or otherwise, and hold and convey, such real estate as may be proper for the purpose of erecting and maintaining its lines of telephone and the appliances and buildings requisite for its business, and to acquire such real estate and rights of way as may be necessary for its business under the writ of assessment of damages, as fully as if the act in relation to said writ were incorporated in the telephone act.[2] In Kansas an express statute puts telephone companies under the general telegraph law.[3] In Michigan a special telephone act gives telephone corporations a right of way over highways and waters similar to that of a telegraph company, but gives no right of eminent domain.[4] In West Virginia a limited right of way is given by statute, so that telephone companies desiring to extend lines of telephone in that State may place poles for wires along any county road, by and with the consent of the county court of the county through which such lines may pass, provided they do not interfere with the public use of the road or with any fruit or shade trees.[5]

§ 83. **Electric Light Franchise, State Statutes.** — The use of electric light for lighting the streets of a town or city is so generally considered as a portion of the proper care of the municipality, and as such, within the powers of the municipal authorities as to the regulation of posts and wires, that special statutes granting electric light companies the right to set their poles and string their wires in public streets are not very numerous. In several States such companies are expressly included with the telegraph and telephone in

[1] *Supra*, §§ 61 *et seq.*
[2] Ann. Stat. § 5523.
[3] Gen. Stat. § 1160.
[4] Howell's Ann. Stat., Suppl., § 3718 d.
[5] Code, App. p. 1059, § 1.

the statutes, so far as regards franchises.[1] In Indiana a special act gives the common council of cities and the board of trustees of towns the power to provide, by resolution or ordinance, for the erection and maintenance, in the streets, alleys, or other public places of said cities and towns, of poles, wires, posts, masts, skeleton towers, and other appliances or structures, as may be necessary for such purpose, or to grant such a right to other persons or corporations for the purpose of supplying inhabitants with electric light; and the corporation may acquire real estate and rights of way necessary for its business, under the writ of assessment of damages, in which case the damages shall include those occasioned by the proximity of such poles, wires, masts, posts, or skeleton towers, to real estate or improvements thereof, as well as damages arising from the appropriation of real estate.[2] In Mississippi incorporated cities, towns, and villages may grant to any person or corporation the use of the streets, alleys, and public grounds for the purpose of laying conduits for electric lights, to be used in furnishing or supplying the municipality or inhabitants, or any person or corporation with light; but the privilege shall not be granted for a longer period than twenty-one years, and shall not be exclusive.[3] In North Carolina the statute gives any electric light companies the right to lay, extend, construct, build, erect, maintain, repair, and remove all necessary or convenient towers, poles, cables, wires, conductors, lamps, fixtures, appliances, appurtenances, in, upon, through, and over, any and all roads, streets, avenues, lanes, alleys, and bridges, within and near any city, town, or village, where

[1] Cal. Stats. 1893, ch. 130; Col. Ann. Stats. § 591; Iowa McC. Ann. Code, § 725; Kan. Gen. Stats. § 555, cl. 22; Ky. Const. § 163; Me. Acts 1885, ch. 378; Md. Acts 1886, ch. 161; Mass. Acts 1889, ch. 398, Acts 1883, ch. 221; N. H. Pub. Stats. ch. 81; N. J. Rev. Supp. p. 742, § 1180; Pa. Bright. Purd. Dig. p. 1628, §§ 4 *et seq.*

[2] Ann Stats. §§ 4301–4305.

[3] Ann. Code, § 2933.

said company may be located, provided that all such roads, streets, lanes, alleys, and bridges shall be left in as good condition as they were in at the time of using them as aforesaid, and also provided that the authorities of the city, town, or village first give their consent.[1]

§ 84. **Electric Railway, State Statutes.** — As has been previously seen, the electric railway is, in a general sense, a species of street railway.[2] The electric railway franchise, therefore, or right to lay tracks and operate cars in the public highways, is derived from statutes giving such rights to street railways, and on this subject the reader must be referred to the many excellent treatises on the subject of street railways. There have been, however, in a few States acts especially authorizing electric street railways to condemn a right of way. In Alabama it is enacted that all street railroad companies shall have the right to use electric force, and may acquire by gift, purchase, or condemnation, real estate for their right of way, to wit, a strip, tract, or parcel of land not exceeding thirty feet in width, and may have the right to condemn and take possession of the land on payment to the owner of a just compensation, in the same manner as the condemnation of lands for public uses, provided that incorporated cities and towns may regulate the construction of street railways within their corporate limits, and the kind of motive power to be used by them.[3] In California the right of eminent domain is expressly given to electric railroads.[4] And in the same State electric cars are authorized to obtain franchises upon the streets,[5] and the same motive power is allowed to steam railroads.[6] In Michigan electric railways are by statute empowered to purchase all the rights and franchises of any toll road company on streets and highways, at a valuation to be agreed upon,

[1] Priv. Laws 1889, ch. 35, § 2.
[2] *Supra*, §§ 22 and 23.
[3] Ala. Laws 1888-1889, No. 65.
[4] Stats. 1893, ch. 130.
[5] Stats. 1891, chs. 18, 19.
[6] Stats. 1893, ch. 175.

and in case no agreement can be reached, the electric railway company may condemn the rights and franchises in the same manner as in the condemnation of railroad lands.[1] The power to set poles in the streets, and use electricity as the motive power, is considered later.[2]

§ 85. **Consent of Municipal Authorities.** — In the foregoing statement of the statutory provisions regarding the franchise or right of way of electric companies in streets and highways, no mention has been made of the necessary consent of the municipal authorities to the setting of poles and stringing of wires in the highways. This subject is so extensive that consideration of both the statutes and the decisions is reserved for a later chapter.[3]

§ 86. **Statutes against Prescription.** — Connected with the subject of the right of electric companies to set their poles and string wires over highways and public lands is a statutory restriction against the acquisition of any prescriptive right by such occupation of the land. In some States statutes have been enacted providing that no easement or prescriptive right shall arise in favor of a telegraph or telephone company from its occupation or use of the land for the setting of its poles or the support of its wires. These statutes are as follows: —

§ 87. **Connecticut: Telegraph, Telephone, Electric Light or Power.** — No person or corporation building and maintaining telegraph, telephone, electric light or power wires or fixtures or electrical wires, conductors, or fixtures of any kind in that State shall, by reason of any occupation or use of any buildings or lands for the support of the wires of said person or company or by reason of said wires passing over or through any buildings or land, acquire by the continuance of such use or occupation any prescriptive right to so occupy or use the same.[4]

[1] Mich. Acts. 1891, No. 67.
[2] *Post*, §§ 183–187.
[3] *Post*, ch. vi.
[4] Con. Gen. Stat. § 3943.

§ 88. **Illinois: Telegraph and Telephone, Electric Light.** — Whenever any wire, pole, or cable used for any telegraph, telephone, electric light, or any other purpose, or for the purpose of communication, is or shall be attached to, or does or shall extend upon or over any building or land, no lapse of time whatever shall raise a presumption of any grant of, or justify a prescriptive right to such attachment or extension.[1]

§ 89. **Maine: Electric Wires.** — No enjoyment by any company, person, or association, for any length of time, of the privilege of having or maintaining posts, wires, or apparatus in, upon, over, or attached to any building or land of other persons shall give a legal right to the continued use of such enjoyment, or raise any presumption of a grant thereof.[2]

§ 90. **Massachusetts: Telegraph.** — No enjoyment by a person or corporation for any length of time of the privilege of having or maintaining telegraph posts, wires, or apparatus in, upon, or over, or attached to any building or land of other persons, shall give a legal right to the continued enjoyment of such easement, or raise any presumption of a grant thereof.[3]

§ 91. **Michigan: Electric Wires.** — Whenever any wire or cable used for any telegraph, telephone, or electric light, or other electric purpose, is or shall be attached to, or does or shall extend upon or over any building or land, no lapse of time whatever shall raise a presumption or justify a prescription of any perpetual right to such attachment or extension.[4]

§ 92. **New Hampshire: Telegraph and other Wires.** — No enjoyment by a person or corporation for any length of time of the privilege of having or maintaining wires and their supports and appurtenances in, upon, over, or attached to

[1] Ill. Stat. 1887, p. 298.
[2] Me. Acts 1885, c. 378, § 7.
[3] Mass. Pub. Stat. ch. 109, § 15.
[4] Mich. How. Ann. Stat. § 4216 a.

any building or land of other persons, shall create an easement or raise any presumption of a grant thereof.[1]

§ 93. **New Jersey: Telegraph, Telephone, Electric Light, and other Wires.** — Whenever any wire or cable used for any telegraph, telephone, electric light, or other wire or cable for other electric purposes, is attached to or extends over or on any building or land, no lapse of time whatsoever shall raise a presumption or justify a prescription of any perpetual right to such attachment or extension.[2]

§ 94. **New York: Electric Wires.** — Whenever any wire or cable used for any telegraph, telephone, electric light, or other electrical purpose, or for the purpose of communication otherwise than by the aid of electricity, is or shall be attached to, or does or shall extend upon or over any building or land, no lapse of time whatever shall raise a presumption of any grant of, or justify a prescription of any perpetual right to such attachment or extension.[3]

§ 95. **Pennsylvania: Electric Wires.** — Whenever any wire or cable used for any telegraph, telephone, electric light, or other wire or cable for electric purposes, is attached to or extends on or over any building or land, no lapse of time whatever shall raise a presumption or justify a prescription of any perpetual right to such attachment or extension.[4]

§ 96. **Rhode Island: Telegraph and other Wires.** — Section 10 of Chapter 175 of the public statutes is amended so as to read as follows: "Section 10. No enjoyment by any persons, companies, or corporations for any length of time of the privilege of maintaining telegraph, telephone, electric light or other posts, wires, or apparatus in, upon, or over any lands or buildings of other persons or corporations shall confer a

[1] Pub. Stat. N. H. ch. 81, § 17.
[2] Rev. Supp. p. 1023, § 4.
[3] N. Y. Rev. Stat., Birdseye, vol. 3, p. 3036, § 26.
[4] Bright. Purd. Dig. p. 1628, § 5.

legal right to the continued enjoyment of such easement or raise any presumption of a grant thereof.[1]

§ 97. **Vermont: Telegraph.** — No enjoyment for any length of time of the privilege of maintaining telegraph posts, wires or apparatus, upon or over the buildings or lands of other persons, shall give a right to the continued enjoyment of such easement or raise a presumption of a grant thereof.[2]

[1] R. I. Laws 1886, ch. 561.

[2] Rev. Laws, § 3640. Otherwise, St. 1894, No. 87.

CHAPTER V.

EMINENT DOMAIN.

§ 98. Eminent Domain.
99. Eminent Domain is vested in the Legislature.
100. Constitutionality of Statutes.
101. Telegraph, Telephone, Electric Light and Electric Railways are Public Uses.
102. Just Compensation.
103. What is a Taking.
104. Poles and Wires in Highway.
105. Horse Railways not an Additional Burden on the Highway.
106. New York Decisions, Street Railway an Additional Servitude.
107. Electric Railway no Additional Servitude.
108. Electric Railway no Additional Servitude (*continued*).
109. Electric Railway no Additional Servitude, (*continued*).
110. Telegraph and Telephone Poles are an Additional Servitude.
111. Telegraph an Additional Servitude.
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113. Other Cases to the Same Point.
114. Right of Abutting Landowner to Access to Land.
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116. Telegraph and Telephone Poles not Additional Servitude in some States.
117. Difference between City Streets and Country Roads.
118. Underground Wires.
119. Condemnation of Location over Railways.
120. Right to Condemn not defeated by Exclusive Contract of other Telegraph Company.
121. Right Condemned must not Interfere with Use of Railroad.
122. Compensation to Railroad.
123. Compensation to Landowner.
124. Compensation to Landowner.
125. Compensation to Landowner.
126. Electric Light Poles are Additional Servitude.
127. Condemnation of one Street Railway by Another.
128. Failure to agree with Owner.
129. Easement only acquired by Condemnation.
130. Proceedings must follow Statute.
131. The Petition.

§ 98. **Eminent Domain.** — The foregoing chapter contained the various statutes of the several States conferring upon electric companies the power to acquire their right of way over highways, railways, public and private lands, by exercise of the right of eminent domain. A discussion will now be had of the various decisions upon this subject, involving the application of those statutes. Eminent domain is the right or power of a sovereign State to appropriate private

property to particular uses, for the purpose of promoting the general welfare.[1]

§ 99. **Eminent Domain is vested in the Legislature.** — The legislature alone can authorize the taking of private property for public use, since the right of eminent domain is one of the inherent qualities of the sovereign power, and the legislature represents the sovereign power of the State, that is, the people. This right of eminent domain exists in the legislature without any special constitutional or statutory grant,[2] but in almost every State an express provision has been inserted in the Constitution, stating the right with a certain limitation, *i. e.*, that private property shall not be taken for public use without just compensation. This statement of the right in the Constitutions does not create the right, which, as was just said, exists in the legislature by virtue of its representing the sovereign power of the State, but is declaratory of the right with its limitation.[3] The right, however, may be delegated by the legislature to public corporations.

§ 100. **Constitutionality of the Statutes.** — The constitutionality of the statutes given in the preceding chapter, and delegating the right of eminent domain to electric companies, depends upon two questions.

First. Is the use for which the poles are erected and the wires strung a public use?

Second. Does the statute provide for "just compensation"?

§ 101. **Telegraph, Telephone, Electric Light and Electric Railways are Public Uses.** — As has already been seen, the four great classes of electric companies are considered as carrying on a business which is a public business, and the property

[1] Lewis, Em. Dom., § 1.

[2] Prather *v.* Western Union Telegraph Co., 89 Ind. 519.

[3] Lewis, Em. Dom., § 9; United States *v.* Jones, 109 U. S. 513, 518; Boom Company *v.* Patterson, 98 U. S. 406; Prather *v.* Western Union Telegraph Co., *supra*.

which they use in this business is employed in a public use.[1] That a telegraph is a public use of property in such a sense that the company may constitutionally enjoy the right of eminent domain, has been discussed and decided in a case in New Jersey.[2] In this case the constitutionality of an act giving the right of condemning a right of way to a telegraph company was the direct issue. The court held that a public use is one which the public may enjoy of right; that the duty of transmitting messages for the public was imposed upon telegraph companies in most States by statute, and the public enjoyed this of right, and therefore the telegraph is a public use; that this view of the case was strengthened by the various statutory requirements by which telegraph companies were obliged to keep open offices at certain intervals on their lines, to submit to a limitation of price, and to transmit all despatches filed at their offices without disclosure; and that these statutory provisions, taken in connection with the grant to the company of the right of condemnation, showed a clear intent of the legislature to lay the companies under an obligation to allow the public to use their lines under reasonable regulations, and that this constituted a public use. In States where express statutes lay the telegraph companies under an obligation to the public to transmit messages the public nature of the use is still more clear.[3] The same view has been taken of telephone lines,[4] which are, in fact, as has been already stated, con-

[1] State, Trenton & New Brunswick Turnpike Co. *v.* American & European Commercial News Co., 43 N. J. L. 381; Pierce *v.* Drew, 136 Mass. 75; New Orleans, Mobile & Texas R. R. Co. *v.* Southern & Atlantic Telegraph Co., 53 Ala. 211; Telegraph, Telephone Co. *v.* Forke, 2 Tex. App. 367; Irwin *v.* Great Southern Telephone Co., 37 La. An. 63; *supra*, §§ 4, 18, 20, 22.

[2] State, Trenton & New Brunswick Turnpike Co. *v.* American & European Commercial News Co., 43 N. J. L. 381.

[3] Pierce *v.* Drew, 136 Mass. 77; American Telephone & Telegraph Co. *v.* Pearce, 71 Md. 539.

[4] Irwin *v.* Great Southern Telephone Co., 37 La. An. 63.

sidered a species of telegraph.[1] Electric railways are so plainly a public use that it seems unnecessary to cite authorities to this point. Moreover, the fact that they are generally constructed on highways, and do not add any new servitude thereto,[2] renders the question comparatively unimportant, since their construction over the highway does not involve the exercise of the right of eminent domain.[3] The tendency to construct electric railways over private property at the present time may raise the question in the courts in the near future. The above remarks may be applied also to electric light lines. They are clearly public uses, but they are constructed in the highways, and as they are generally used to light the highway, are considered to make no addition to the servitude of the way.[4]

§ 102. **Just Compensation.** — The second requirement to the constitutionality of the statutes given in the preceding chapter, delegating to electric companies the right of eminent domain, is that they shall provide just compensation for the property taken. If the statute fails to make such a provision, it is unconstitutional, and a court of equity will enjoin the company from entering on land, or building its line, and will not compel the owner to sue for damages.[5] An examination of the statutes as set forth in the foregoing chapter will show that in almost every case there is a provision for compensating the landowner for the right to construct the line on his property. Of course where the line is constructed on a highway and does not add a new servitude, as in the case of an electric street railway, or (in some States) a telegraph line, or is constructed along a railway for

[1] American Telephone & Telegraph Co. *v.* Pearce, *supra; supra*, § 18.

[2] *Infra*, §§ 107 *et seq.*

[3] Cf. Jersey City & Bergen Ry. Co. *v.* Jersey City & Hoboken Horse R. R. Co., 20 N. J. Eq. 66. Cf. Rahn Township *v.* Tamaqua & L. St. Ry. Co., 31 Atl. Rep. 472.

[4] *Infra*, § 126.

[5] American Telephone & Telegraph Co. *v.* Pearce, 71 Md. 539; North Baltimore Passenger Ry. Co. *v.* North Avenue Ry. Co., 75 Md. 245.

railway purposes, there is no taking of property, and the owners of the adjoining lands, or the soil of the highway, are not entitled to compensation.[1] An important point concerning the constitutionality of these statutes is the time when the compensation is to be paid, whether before construction or after; which depends on the wording of the statute. Whether or not a statute which allows the construction to proceed before compensation is paid is constitutional, depends upon the language of the constitutional limitation on this point, and has been variously decided in different States on various kinds of public uses.[2] In one case it was held that the provision for compensation must be of such a nature as to make it possible for the landowner to receive his compensation before the actual occupation or use of the property is begun, so that he is not obliged to wait for the issue of a lawsuit in order to recover his compensation.[3] In this case a telegraph company sought to condemn a right of way in Georgia over the way of a railroad company, and this proceeding was resisted by the railroad company and by the Western Union Telegraph Company, which already had its lines over the right of way of the railroad company. The court examined the statute under which the second telegraph company was proceeding, and found that its sections provided simply a mode of assessing the damages of the landowner for the building of the line, and did not give him any method of proceeding to enforce the payment of these damages before the construction began, nor any mode of appeal from the arbitrators who assessed the damage to any court for change in the amount of the assessment, nor for proceedings to recover it; that there was in reality no

[1] Jersey City & Bergen R. R. Co. *v.* Jersey City & Hoboken Horse R. R. Co., 20 N. J. Eq. 61; Pierce *v.* Drew, 136 Mass. 77; American Telephone & Telegraph Co. *v.* Pearce, 71 Md. 535; see *infra*, §§ 107 *et seq.*, 116.

[2] See Lewis, Em. Dom., § 454.

[3] Southwestern Railroad Co. *v.* Southern & Atlantic Telegraph Co., 46 Ga. 43.

sufficient provision for the compensation of the landowner for the taking of his property, and that the statute was therefore unconstitutional.[1] And the better rule is that the compensation must be paid before construction begins.[2]

§ 103. **What is a Taking.** — The specific question which arises most often in connection with electric companies in the matter of eminent domain is the question whether or not the construction, maintenance, and operation of the line constitutes a taking of private property, and this question has two branches; first, when the lines are constructed over highways; second, when constructed over private property, including herein the construction of telegraph lines over the right of way of railroads. It is a well-settled principle of the law of eminent domain that the taking of an easement over land is as much a taking of the private property as taking the fee, and in like manner any interference of a permanent nature with the property rights of the landowner is *pro tanto* a taking of his natural right in the property.[3] It would therefore be expected that the courts would decide that the construction of electric lines is a taking of private property, when they are constructed upon private property, and this will be seen later to be the actual decision of the courts.

§ 104. **Poles and Wires in Highway.** — Considering first the construction of electric lines upon highways, the main question is whether such lines constitute an additional use of the highway outside of those uses for which it was originally dedicated, for if so, it is the imposing of an additional servitude upon the land of the owner of the soil beneath the highway, and constitutes a taking of his property for which

[1] Southwestern Railroad Co. *v.* Southern & Atlantic Telegraph Co., 46 Ga. 43; Cf. Taylor *v.* Bay City St. Ry. Co., 80 Mich. 77.

[2] Dusenbury *v.* Mutual Telegraph Co., 11 Abb. (N. C.) 440.

[3] Eaton *v.* Boston, Concord & Montreal R. R. Co., 51 N. H. 504.

he may claim compensation.[1] As the different electric companies stand on a different footing in this respect, it will be necessary to examine them separately.

§ 105. **Horse Railways not an Additional Burden on the Highway.** — The electric street railway is, in fact, a development of the horse railway. The courts have almost universally held that a horse railway is not an additional burden upon a highway, for it promotes public travel which is the main purpose of the highways, and is not a mode of travel which excludes the general public from the use of the street for similar purposes, even though the vehicles of the railway are restrained in their course of travel by fixed rails, and these rails permanently occupy a small portion of the space of the public road. Consequently the construction of a street railroad to be operated by horses upon and along a highway does not create an injury for which damages can be recovered by the abutting landowner, even when he owns the fee of the land under the highway, and does not raise the question of eminent domain.[2]

In one of the Massachusetts cases cited the court says, "The franchise granted to a street railway corporation is not the grant of a right to appropriate without compensation an additional easement in the soil of the street. Nor can such use of the streets under proper restrictions be considered as an imposition of an additional servitude upon the landowner. The peculiar privilege given is the right, not to acquire land

[1] Dusenbury *v.* Mutual Telegraph Co., 11 Abb. N. C. 440; Stowers *v.* Postal Telegraph Cable Co., 68 Miss. 559; Chesapeake & Potomac Telephone Co. *v.* Mackenzie, 74 Md. 36; Board of Trade Telegraph Co. *v.* Barnett, 107 Ill. 507; Broome *v.* New York & New Jersey Telephone Co., 42 N. J. Eq. 141. See also *post*, §§ 202–211.

[2] Briggs *v.* Lewiston & Auburn H. Ry. Co., 79 Me. 363; Koch *v.* North Avenue Ry. Co., 75 Md. 222; Hiss *v.* Baltimore & Hampden Pass. Ry. Co., 52 Md. 242; Atty.-Gen. *v.* Metropolitan R. R. Co., 125 Mass. 515; Onset Street Ry. Co. *v.* County Commissioners, 154 Mass. 400; Jersey City & Bergen R. R. Co. *v.* Jersey City & Hoboken Horse R. R. Co., 20 N. J. Eq. 61, 66; Eichels *v.* Evansville St. Ry. Co., 78 Ind. 261.

or an easement in land, but only the right, so long as permitted by certain municipal authorities, to lay tracks in streets already appropriated to the uses of public travel, for the purpose of facilitating such travel; to modify the public use, and change, to some extent, the law of the road. Such a privilege, however wide the street in which it is exercised, must always create some obstruction to other travel, and be, to some extent, exclusive, and this is true of all other kinds of public travel. The location of a highway creates a servitude which includes all forms of travel not prohibited by law, with the right in the legislature to give to municipal or other corporations, or to private individuals, the power reasonably to modify the use of the same for travel as public convenience and necessity in the application of modern improvements may from time to time require." [1]

§ 106. **New York Decisions, Street Railway Additional Servitude.** — In New York, however, the decisions are that even a horse railroad, and *a fortiori* an electric railway, is an additional easement upon the highway not contemplated among the uses for which it was originally dedicated, and for which, therefore, the consent of the owners of the soil beneath the highway is necessary,[2] although the courts there hold that if the fee of the land is in the public, a horse railroad on the surface is not a taking of any property from the owner of abutting lands for which he can recover compensation.[3]

§ 107. **Electric Railway no Additional Servitude.** — Following the line of the greater number of decisions as to horse street railways the courts hold that the construction and operation of an electric railway over a highway does not put

[1] Atty.-Gen. *v.* Metropolitan R.R. Co., 125 Mass. 515.

[2] Craig *v.* Rochester City & Brighton Railroad Co., 39 N. Y. 404; McCruden *v.* Rochester Ry. Co., 25 N. Y. Supp. 114; s. c. 28 N. Y. Supp. 1135; Cf. Curvin *v.* Rochester Ry. Co., 78 Hun, 535.

[3] Kellinger *v.* Forty-second Street, etc. R. R. Co., 50 N. Y. 206; but see *post*, § 109.

an additional servitude upon the highway for which the owners of the land underneath or abutting on the way may claim additional compensation.[1] An important case on this point was decided by the Supreme Court of Pennsylvania.[2] In this case a bill in equity was brought by the owners of the land abutting on the street and owning the soil under the street against a street railway company which was intending to put in an electric equipment. The street in question had been recently paved with asphalt, and one of the grounds relied upon by the complainants was that, having paid for the pavement of the street, they obtained a vested interest in the pavement itself, and consequently any interference with it by the street railway company was a trespass. This ground was additional to their rights as owners of the fee underneath the street, and of the land adjoining, and also as members of the general public entitled to the free and unrestricted use of the street. The Supreme Court simply dismissed the bill without giving any opinion, but the judge in the court below entered into a discussion of the question which shows clearly the rights of the various parties in the street. The Court says: —

"There can be no doubt that under a proper charter the city had a right to allow the streets to be used for a street

[1] Lockhart *v.* Craig St. Ry. Co., 139 Pa. St. 419; Taggart *v.* Newport St. Ry. Co., 16 R. I. 668; Halsey *v.* Rapid Transit St. Ry. Co., 47 N. J. Eq. 380; Powell *v.* Marion & I. S. Ry. Co., 92 Ga. 209; Detroit City Ry. *v.* Mills, 85 Mich. 634, 651; Louisville Bagging Co. *v.* Central Pass. Ry. Co., 23 S. W. Rep. 592, Louisville, Ky.; People *v.* Fort Wayne & E. Ry. Co., 92 Mich. 522; Koch *v.* North Avenue Ry. Co., 75 Md. 222; Green *v.* City & Suburban Ry. Co., 28 Atl. Rep. 626; Dean *v.* Ann Arbor St. Ry. Co., 93 Mich. 330; Niemann *v.* Detroit Sub. St. Ry. Co., 61 N. W. Rep. 519 (Mich.); Detroit *v.* Detroit City Ry. Co., 56 Fed. Rep. 874; Mt. Adams & Eden Park Inclined Ry. Co. *v.* Winslow, 3 Oh. Cir. Ct. Rep. 425. Cf. Rafferty *v.* Central Traction Co., 147 Pa. St. 579; Briggs *v.* Lewiston & Auburn H. Ry. Co., 79 Me. 363; Williams *v.* City Electric St. Ry. Co., 41 Fed. Rep. 556; Cumberland Telegraph & Telephone Co. *v.* United El. Ry. Co., 29 S. W. Rep. 104. But see *post*, § 109.

[2] Lockhart *v.* Craig St. Ry. Co., 139 Pa. St. 419.

railway with horses as the motive power. So far as the street use proper is concerned, there is no substantial difference between the tracks of such a street railway and one operated by electricity. We may consider, then, that in the occupation of the street with tracks, intermediate paving, and the appliances in ordinary use for a railway operated by horses, there is nothing of which the plaintiffs can legally complain. Whatever dust, noise, and annoyance is incident, they must submit to.

"But there is a material and substantial difference between such a road and the one contemplated by the defendants as regards its relations to the plaintiffs' property. The proposed road not only occupies the middle portion of the street or cart way, but will, as a necessary part of its machinery, have iron posts more than eighteen feet high, permanently fixed three or four feet in the ground along or near the curb of the pavement or sidewalk, upon which will also be placed permanent lines of wire crossing the street, and upon which will also be placed a permanent line over each track running longitudinally with the street. Do these, singly or together, amount to such a taking of the plaintiffs' property as is prohibited by the Constitution without compensation? The placing of the wires over the street does not appear to be a taking of the plaintiffs' property. The streets are dedicated to the public use, and I cannot see how a wire run through the air above the streets can be said to be a taking, injury or a destroying of the plaintiffs' property. But another question arises in reference to the poles placed in the ground for the support of the wires by means of which the cars are run. It has generally been understood in this State that the abutting owner has fee to the middle of the adjoining street, and that the public has only a right of passage along it, but this must not be taken in its literal sense, especially in towns and cities. What might be considered an invasion of private rights so far as the use of the highway is concerned in the

country, might not be so in a city. Thus a city, by virtue of its general authority, may build sewers in the streets, and the adjoining proprietor is not entitled to have damages assessed as for a new use or servitude. In such case the street is not only used without compensation to the adjoining owner, but he is compelled to pay for the use of the sewer. . . . So the right to lay down gas pipes in the streets given by the legislature to municipal authorities without allowing compensation, has been recognized by the courts. . . . So with water-pipes, awning-posts, fire-plugs, and lamp-posts. These all impinge more or less upon the absolute right of the owner of the soil, and are not necessary to accommodate public travel or even consistent with public right to an unobstructed passage-way and it may now be taken as settled that the owners' rights to abutting property are subject to the permanent right of the public, and the rights of the public are not limited to a mere highway, but extend to all beneficial, legitimate street uses, such as the public may, from time to time, require. . . . Recognizing the right of the legislature and city authorities to authorize the building of railways upon the streets of a city without compensation to property owners because it is a means of public transportation and accommodation, the necessary and proper apparatus for moving them must be allowed to follow as an incident, unless there is something illegal in its construction or use."

§ 108. **Electric Railway no Additional Servitude** (*continued*), **Rhode Island.** — This question also came before the Supreme Court of Rhode Island in the case of Taggart *v.* The Newport Street Railway Company.[1] That was an action by the abutters on certain streets in the city of Newport in that State, along and over which the tracks or wires of the defendant company's street railway had been laid. The object of the action was to have the company enjoined from erecting or maintaining its poles and wires for the overhead

[1] 16 R. I. 668.

trolley system in the streets in front of their property. Poles were erected to stretch the wires over said tracks for the conduct of electricity, which was to be used as the motive power for the passenger-cars traversing said tracks. The poles were placed along the margins of the sidewalks of said streets about one hundred and twenty feet apart, and were placed there by permission of the council of the city of Newport, given by an ordinance. The case was submitted on bill and answer, the facts being admitted.

The third ground in support of the bill was that the erection of the poles on the sidewalks to hold up the wires in connection with the operation of the electric plant, was an invasion of the property rights of said abutters, for which compensation should be made. The court said: —

"The poles are certainly in a portion of the streets not occupied by the tracks, but they do not encumber that portion in the meaning of the word as it is used. The poles are very slightly in the way of travel, being placed as hitching-posts, lamp-posts, electric light poles, telegraph and telephone poles are placed, near the front margins of the sidewalks. . . . We have already decided that the council has the power by section 5 of the charter of the company to authorize the use of electricity, so that the question is only as to the manner of using, and as to whether the council has the power to authorize the use in said manner.

"It seems to us that the provision [in the company's charter] that the cars on the road shall be operated by steam, horse, or other power, as the council of said city or town may from time to time direct, is broad enough to empower said council not only to authorize the use of electricity as a motor, but also to authorize its use by means of any system of application which it approves as suitable. Our conclusion is that the power conferred by section 5 [of the charter] is not qualified by the concluding words of section 7, and that the poles complained of, having been erected under section 5

as part of the apparatus for supplying the railway with its motive power, are to be regarded as not encumbering the streets, but as ministering to their uses and increasing the facilities for travel which they afford to the public."

The fourth ground upon which the plaintiff in that case relied, was that the act of incorporation which authorized the use of electricity for the operation of said street railways, and the erection of poles as auxiliary thereto, was unconstitutional and void, because it authorized the imposition of an additional servitude upon the streets without providing for any additional compensation to the owners of the fee of the said streets. As to this claim the court said: —

"We think it settled by the greater weight of authority that a railroad constructed in a street, and operated by steam in the usual manner, imposes a new servitude and entitles the owner of the fee to additional compensation; but a street railway, operated by horse power, as such street railways are ordinarily operated, does not impose any new servitude, and does not entitle the owner of the fee to any additional compensation.

"The distinction is often stated as a distinction between steam and horse railroads; but the distinction properly rests not on any difference in motive power but in the different effects produced by them respectively on the highways or streets which they occupy. A steam railroad imposes a new servitude, not because it is operated by steam, but because it is so operated as to be incompatible with the use of the street; in other words, so as practically to exclude the usual modes of its use.[1] A steam railroad on a street so operated as to be consistent with the use of the street, in the usual modes of its use, has been held not to impose a new servitude.[2] It is not the motor, but the kind of occupation,

[1] Pierce on Railroads, 234.

[2] Fulton *v.* Short Route Railway Transfer Co., 85 Ky. 640.

whether practically exclusive or not, which is the criterion.[1] An ordinary street railway, instead of adding a new servitude to a street, operates in furtherance of its original uses, and instead of being an embarrassment, relieves the pressure of local business and local travel. . . . We see no reason to suppose that this form of danger, that is, the supposed alarm to horses by electric cars, is so great that on account of it the defendant railway should be ruled as an additional servitude."

As to the fact that telegraph or telephone poles and wires erected on streets or highways constitute an additional servitude, entitling the owners of the fee to additional compensation, the court says: "But, assuming that telegraph and telephone poles and wires do create a new servitude, we do not think it follows that the poles and wires erected and used for the operation of said electric street railway create a new servitude. Telegraph and telephone poles and wires are not used to facilitate the use of the streets where they are erected for travel or transportation, or very indirectly so: whereas the poles and wires of this electric railway street-car company are directly ancillary to the uses of the street, as such, in that they communicate the power by which the street-cars are propelled. It has been held, for reasons which were considered irrefragable, that a telegraph erected by a railroad company within its location for the purpose of its railroad, to increase the speed and efficiency thereof, does not constitute an additional servitude, but is only a legitimate development of the easement originally acquired."[2]

§ 109. **Electric Railway no Additional Servitude** (*continued*). — The owners of land abutting on a highway, whether they be owners of the fee of the highway or not, have certain property rights incident to the use and enjoyment of their

[1] Briggs *v.* Lewiston & Auburn Horse Railroad Co., 79 Me. 363.

[2] Western Union Telegraph Co. *v.* Rich, 19 Kan. 517.

land as such. These rights are the right of access to the property, of light and air in front of it, and other incidental rights of use. It has been claimed in some cases that the electric railway poles and wires interfere with the enjoyment of these rights, and therefore constitute a taking of the property of the landowners *pro tanto*. Unquestionably, if an electric railway pole were so placed as to destroy or injure access to the land from the street, the owner of such land would be entitled to have the pole moved so as to permit him to have access to his land.[1] Such a case is hardly supposable, as the poles are generally put on the outer edge of the sidewalk, but might occur if the pole were set directly in front of and upon a driveway which the landowner used for the passage of carriages and teams into his land. This point was raised and discussed in a case in Kentucky, but the evidence in that case showed that the use which the plaintiff corporation made of the sidewalk for teams to drive upon for the purpose of getting freight from its premises was illegal. In the same case the plaintiff corporation relied somewhat upon the fact that the operation of the railway caused a buzzing noise in its telephone, and thus interfered with the use of its property. The facts showed, however, that the telephone was not its property, and that the buzzing noise existed before the line of railroad in question was built; therefore would not be affected by the discontinuance of this particular line.[2]

The construction of an electric street railway, may in other ways inflict such injury upon the owner of abutting land as to his right of access thereto that he may be entitled to compensation even though such construction does not constitute an additional servitude upon the highway. Thus where an electric railway was authorized to construct its tracks upon

[1] Detroit City Ry. *v.* Mills, 85 Mich. 634, 655; see also *infra*, § 114.

[2] Louisville Bagging Mfg. Co. *v.* Central Pass. Ry. Co., 23 S. W. Rep. 592. See also *post*, §§ 202–211.

a street, and in order to do so dug down a distance of twenty-seven feet in the street in front of the plaintiff's premises in order to lay the tracks upon the official grade of the street, and this excavation extended laterally to within ten feet of the plaintiff's land, it was held that his right of access to his land was substantially destroyed, and he might recover damages therefor.[1]

In several recent Pennsylvania cases the Supreme Court of that State has drawn a new distinction on this subject, holding that although an electric street railway is not an additional servitude in a city street, where the municipal authorities have full possession of the entire street for purposes of public travel, yet in country roads, where the public has merely a right of passage, an electric railway is an additional servitude for which the owners of the land underneath the highway may obtain damages, or, in default thereof, may enjoin the construction of the railway.[2] The court, in these cases, has dwelt with some emphasis upon the distinction between an electric railway wholly within the limits of one municipality and one which extends from town to town, and is intended for long distance transportation. A careful definition of what sort of electric railway is not an additional burden on the street was given in a New Jersey case as follows: "A street railway constructed on the highway under authority of law, with a roadbed which will admit of free use of the highway by all other lawful means, operated by cars patterned after the size and style of cars ordinarily in use by horse railways, the motive power of which is electricity supplied by overhead wires, supported by poles placed in the sidewalks immediately inside the

[1] Eachus *v.* Los Angeles Consolidated Electric Railway Co., 37 Pac. Rep. 751.

[2] Pennsylvania Railroad Co. *v.* Montgomery County Pass. Ry. Co., 31 Atl. Rep. 468; Thomas *v.* Intercounty St. Ry. Co., 31 Atl. Rep. 476; Rahn Township *v.* Tamaqua & L. St. Ry. Co., 31 Atl. Rep. 472.

curb, is no additional burden upon the use of the street." [1] In this same case the court raised the question of whether an electric road may not, if differently constructed and operated, become an additional servitude; for instance, if it has large cars, such as are used by steam railroads, and high rails projecting above the surface of the street, or if it should run trains of cars, or should run through cars for long distances, using the highways merely as a means of getting from one place to another; and also raised the question of whether special damages may not be caused to abutting owners by setting the poles in such way as to interfere with improvements of the owner under the sidewalk of the street, or otherwise injuring his rights of access, light and air, and reasonable approach to his house for fire apparatus in case of fire.[2]

§ 110. **Telegraph and Telephone Poles are an Additional Servitude.** — It is generally but not uniformly held by the courts of the different States that the construction, maintenance, and operation of a telegraph or telephone line along and over a highway creates an additional servitude for which the owner of the land underneath the highway may recover additional compensation, and that the construction under a grant by the municipal authorities of the right to erect poles and string wires constitutes a taking of the property of the landowner for this purpose, and therefore an exercise of the right of eminent domain.[3] This rule results from the nature of the use which is made of the poles and wires, viz., the

[1] West Jersey Railroad Co. *v.* Camden, G. & W. Railway Co., 29 Atl. Rep. 423.

[2] Ib.; on this latter point compare *post*, § 114.

[3] Eels *v.* American Telephone & Telegraph Co., 143 N. Y. 133; Dusenbury *v.* Mutual Telegraph Co., 11 Abbott (N. C.), 440; Blashfield *v.* Empire State Telegraph & Telephone Co., 18 N. Y. Supp. 250; Stowers *v.* Postal Telegraph Co., 68 Miss. 559; Chesapeake & Potomac Telephone Co. *v.* Mackenzie, 74 Md. 36; Smith *v.* Central, etc. Telegraph Co., 2 Ohio C. C. 259; Board of Trade Telegraph Co. *v.* Barnett, 107 Ill. 507;

transmission of intelligence. The courts generally hold that the highways are dedicated to the public by the landowner, simply and solely for the purposes of public travel, and as has been seen, any method of public travel which is not exclusive in its nature may be carried on over the highways without increasing the burden of the highway upon the subjacent land beyond the uses which were originally contemplated when the right of travel was so given. The fact that a mode of travel is new, and was unknown at the time of the dedication of the highway, does not prevent it from coming under the uses contemplated in the original dedication. The use of the highways, however, for the transmission of intelligence is a use wholly different from public travel. Incidentally, no doubt, it effects somewhat similar objects, as was noted in one case where the court says that the effect of the telephone poles and wires in the street is actually to diminish the use of the streets for public travel, for the fact of a message being transmitted over the wires prevents the necessity of the employment of a messenger for the same purpose. The nature of the use, however, is essentially different, and the courts have generally recognized this difference.

§ 111. **Telegraph an Additional Servitude.** — Thus in an early case in New York it was held that the setting of poles and the stringing of wires for a telegraph line constituted an additional servitude which must be paid for to the owner of the soil beneath before the highway could be so used.[1] It is noticeable in this case that the statute giving the right to set poles also provided for compensation to the owners of the

Pacific Postal Telegraph Cable Co. *v.* Irvine, 49 Fed. Rep. 113; Atlantic & Pacific Telegraph Co. *v.* Chicago, Rock Island & Pacific Railway Co., 6 Biss. 158; Western Union Telegraph Co. *v.* Williams, 86 Va. 699; Broome *v.* New York & New Jersey Telephone Co., 42 N. J. Eq. 141; Willis *v.* Erie Telegraph & Telephone Co., 37 Minn. 347; Prentiss *v.* Cleveland Telegraph Co., 32 Weekly L. Bull. 13.

[1] Dusenbury *v.* Mutual Telegraph Co., 11 Abbott (N. C.), 440.

fee for such setting, as is generally the case in telegraph statutes, and the decision of the court was, in reality, only that such compensation must be made before the poles can be set, and that the landowner shall not be obliged to allow the setting and wait to recover his compensation by suit in court, but this point evidently includes the other.

§ 112. **Telephone an Additional Servitude.** — A similar decision was reached in the same State to the effect that the construction of a telephone line by the erection of poles and stringing of wires within the limits of a country highway, is an additional burden on the fee not contemplated in the original taking of the land for highway purposes, and that the right so to construct such line must be by grant or condemnation proceedings with compensation to the landowner.[1]

§ 113. **Other Cases to the Same Point.** — The same decision was made in Illinois,[2] in a case in which it was held that the telegraph was a new use of the street not contemplated in the original taking or dedication, and that there should be compensation made to the landowner for this use.

The Supreme Court of Virginia has decided in the same way,[3] holding that the use of the road for telegraph poles is a new use for which the landowner can claim additional compensation. In this case a dissenting opinion was filed.

§ 114. **Right of Abutting Landowner to Access to Land.** — Even if the abutting landowner does not own the fee underneath the street or highway, he has, as was stated in regard to the poles of electric railways,[4] certain rights growing out of his ownership of the land which may be shortly stated to

[1] Blashfield *v.* Empire State Telegraph & Telephone Co., 18 N. Y. Supp. 250. Compare Metropolitan Telephone & Telegraph Co. *v.* Colwell Lead Co., 50 N. Y. Super. 488; Tiffany *v.* United States Illuminating Co., 51 N. Y. Super. 280.

[2] Board of Trade Telegraph Co. *v.* Barnett, 107 Ill. 507.

[3] Western Union Telegraph Co. *v.* Williams, 86 Va. 699.

[4] *Supra*, § 109.

consist of rights of ingress and egress to and from his premises, over the highway, and access of light and air to his premises. The setting of a telephone or telegraph pole and stringing the wires over the sidewalk or on the highway in front of his premises, therefore, may interfere in some degree with the free and full use by him of his premises. Whether this interference is sufficient to give him the right to compensation depends upon the position of the pole, and other circumstances. If the pole does not substantially interfere with any of his rights of approach to his premises, it is difficult to see how he can recover any compensation therefor; but if the pole does interfere with such approach, as, for instance, if it should be set in a driveway leading to his house or directly in front of his carriage-gate in his fence, he may claim compensation therefor; or, as one court expresses it, "If the poles unreasonably abridge the right of adjacent lot-owners to use the street as a means of ingress or egress or otherwise, they can recover compensation therefor."[1] And this has been said to be the rule even if no present injury is done, providing there is an obstruction of access of light and air or ingress or egress which would affect a future building placed on the land;[2] but it does not necessarily follow that the erection of the poles will be enjoined. The party may be left to his remedy at law.[3]

§ 115. **Wires alone overhanging Street not an Injury to Landowner.** — The question whether the mere stringing of a wire over a street, the fee of which is in the abutting landowner, is a damage to him, even though setting a pole in

[1] Chesapeake & Potomac Telephone Co. *v.* Mackenzie, 74 Md. 48; Stowers *v.* Postal Telegraph Cable Co., 68 Miss. 559; Clausen Brewing Co. *v.* Baltimore & Ohio Telegraph Co., 2 Am. El. Cas. 210; Niemann *v.* Detroit Suburban St. Ry. Co., 61 N. W. Rep. 519 (Mich.). See also *post*, §§ 202–211.

[2] Clausen Brewing Co. *v.* Baltimore & Ohio Telegraph Co., *supra*.

[3] Hewett *v.* Western Union Telegraph Co., 4 Mackey, 421.

the street would be unquestionably a damage, was raised in a case in New Jersey, and discussed but not settled. In this State the statute requires the consent of the abutting landowner to the setting of telegraph poles in the street. The plaintiff in this case had refused his consent, and as his lot had a comparatively narrow frontage on the street, the telegraph company intended to set its poles on the sidewalk of the street in front of the adjoining land on each side, and to string the wire across between these poles without setting any pole in the street in front of the plaintiff's land. Plaintiff brought a bill in equity to enjoin this construction, and the court discusses the question of whether in such circumstances the existence of the wire over that portion of the street which ran over the plaintiff's land was such an injury to him or taking of his property as would authorize an injunction, and the court held that the injury was very slight, and that it was doubtful whether there was any at all, and refused to grant the injunction.[1]

§ 116. **Telegraph and Telephone Poles not an Additional Servitude in Some States.** — In some States, contrary to the general current of authority, it has been held that the setting of telegraph poles in a highway does not constitute an additional easement on the highway, the court basing this opinion upon the inclusion of the use of the highway for the transmission of intelligence among the uses of the original dedication.[2] Thus, in a case where the owners of the land abutting on the highway, owning the fee under the highway, brought suit to enjoin the setting of telegraph poles in front of their land, on the ground that it was an additional servitude for which they were entitled to compensation before the poles could be set, the court held that the discovery of the telegraph developed a new and valuable mode of communicating intelligence; that its use is certainly

[1] Roake *v.* American Telegraph & Telephone Co., 41 N. J. Eq. 35.
[2] Pierce *v.* Drew, 136 Mass. 75.

similar to, if not identical with, that public use of transmitting information for which the highway was originally taken, even if the means adopted are quite different from the post-boy or the mail-coach; that it is a newly discovered method of exercising the old public easement, and all appropriate methods must be deemed to have been paid for when the road was laid out, and that the use of the highway for the telegraph did not constitute a new easement. A strong dissenting opinion was filed in this case to the effect that the setting of such poles did constitute an additional servitude. The majority of the court was much influenced by the fact that the setting of other poles had been acquiesced in for a long time by adjacent landowners throughout the State, without claim for compensation, and that a decision giving a right to additional compensation would impose an excessive liability upon the telegraph companies. It is also to be noted that in this State the statute authorizing the setting of such poles gave no right of compensation to the landowner for such setting, and therefore would have been unconstitutional if the court had held the setting to constitute an additional servitude.

The courts of Missouri, Montana, Michigan, and Vermont follow the same line.[1]

In a case in Missouri the action was a suit by a landowner for an injunction against a telegraph company from setting poles in front of his land on the sidewalk. The sidewalk was about six feet wide, the street was a narrow one, and the poles were from twenty to twenty-four inches in diameter. Being set on the outside edge of the sidewalk they took away about two feet from the available travelling space. The court examined the statute of Missouri, which is, in many

[1] Julia Building Ass'n *v.* Bell Telephone Co., 88 Mo. 258; Gay *v.* Mutual Union Telegraph Co., 12 Mo. App. 485; Hershfield *v.* Rocky Mountain Bell Telephone Co., 12 Mont. 102; and to the same effect People *v.* Eaton, 100 Mich. 208; Western Union Telegraph Co. *v.* Bullard, 65 Vt. 634; Rugg *v.* Commercial Union Telegraph Co., 66 Vt. 209; see also *post*, § 202; Cater *v.* N. W. Teleph. Exch. Co. (Minn.), 63 N. W. Rep. 111.

respects, like the United States statute, and held that it gave the telegraph company the right to set poles, provided they did not unnecessarily incommode the public in travelling, and that under the circumstances there was not such obstruction to travel as would render the setting of the poles unlawful.[1]

In a later case, Julia Building Association *v.* Bell Telephone Company,[2] the same subject came before the Missouri courts on a suit for an injunction against a telephone company from setting its poles on the sidewalk. In this case the plaintiff's cellar extended under the sidewalk throughout its breadth. The side of the cellar was composed of a thin brick wall, and between that and the street was a thick stone wall at a distance of a few inches, this stone wall being used to restrain the earth of the street, which was moist and loose, from pressing against the brick wall, and to keep water out of the cellar. The defendant company was setting its poles down through the edge of the sidewalk and into the stone wall in such a way as to materially weaken the stone wall and render it unfit for the purposes for which it was built. The court, examining the facts, held in the first place that Gay's Case settled the law on this point as to the regulating of setting the poles in the sidewalk, so far as the general damages to the approach of the plaintiff's premises were concerned, and it did not appear that the plaintiff was especially incommoded by having the posts set in front of the doorway of his building, or in such other manner as to actually render access to his building difficult, and therefore did not suffer any special damage. As to the question of the damage to the wall, the court held that as the plaintiff derived his title from the original owners of the land, who had dedicated a part of it to public uses as a street, he took his land subject to such rights of the public, and that as the setting of telephone poles was a legal use of the

[1] Gay *v.* Mutual Union Telegraph Co., 12 Mo. App. 485.

[2] 13 Mo. App. 477.

streets, his wall must be held to be subject to such use, and if it was injured by the setting of the poles, he must himself remedy the injury, although possibly an action for damages might be given him against the telephone company.

§ 117. **Difference between City Streets and Country Roads.** — In recent cases there has been shown a tendency in one or two instances to draw a distinction between country roads (or rural highways, as they are called) and city streets, as to their use by electric poles. As has been already seen, the greater volume of authority is to the effect that planting telephone or telegraph posts upon a public highway in the country is an appropriation of private property, and unlawful unless acquired by condemnation or consent. The numerous necessities of city life require greater and more numerous uses of the streets by the public than in the country. The owner of the land underneath a country highway has all rights to the earth, the timber and grass growing thereon, and all the minerals, quarries, and springs beneath the surface; the public has only the right to travel over it. In populous city streets, however, the public convenience requires more than the mere right of passage, and the streets may be graded, the surface paved, trees cut down, and culverts, drains, and sewers made upon and under the surface. Pipes may also be laid under the surface for the various agencies of city life, such as water, gas, electricity, steam, and other things capable of that mode of distribution. These differences were adverted to in a recent case in Maryland,[1] but the court did not go so far as to draw any result therefrom, and held that in the case under consideration the telephone pole was an additional burden upon the highway. The case is interesting, however, as indicating a distinction drawn by the courts which may result in holding that in cities, the setting of telegraph and telephone poles does not

[1] Chesapeake & Potomac Telephone Co. *v.* Mackenzie, 74 Md. 48. See also to the same effect, Lockhart *v.* Craig St. Ry. Co., 139 Pa. St. 419.

constitute an additional use of the streets for which the landowner can obtain additional compensation, or in default thereof, may enjoin the construction.

In a recent case, the question whether telegraph poles are an additional servitude on a rural highway was discussed in New York State, and the court held that they were, being wholly distinct from the purposes of public travel for which the way was originally dedicated. The court in this case considers the question of the difference between rural highways and city streets in this matter, saying that the latter may require more numerous public uses than the former, and that the adjoining proprietors may be taken to have consented to these additional uses when the street was laid out, but the court does not decide this question, and simply holds that on rural highways the telegraph poles constitute without the landowner's consent an illegal structure for which the owner of the fee of the highway may have ejectment.[1]

§ 118. **Underground Wires.** — The principles which have been stated in regard to the poles and wires of telegraph, telephone, electric light, and electric railway companies, on the question whether they are additional servitudes on the highway, would seem to be applicable in the same way to the wires of such companies, when they are run under ground. It is not known that the question has been directly raised in any case, but the statutes which authorize or compel electric companies to put their wires underground have been held to be constitutional in the cases in which they have been discussed.[2]

§ 119. **Condemnation of Location over Railways; Right depends on Statute.** — So far the discussion has concerned only poles set in public highways. Whether an electric company can condemn a location for its poles and wires over

[1] Eels *v.* American Telephone & Telegraph Co., 143 N. Y. 133. Cf. *ante*, § 109.

[2] See *post*, §§ 162–167.

the right of way of a railroad company, depends upon whether the statutes of the State give the former company the right to condemn a right over the railway for this purpose. The statutes of many States, as has been seen, expressly give telegraph and in some cases telephone companies the right to do this.[1] This statutory authority must be given expressly, for such statutes, being in derogation of common-law rights, will not be extended by construction. Thus in a case in New York,[2] where the statute authorized a telegraph company to erect and construct from time to time the necessary fixtures for said line of telegraph upon, over, and under any of the public roads, streets, and highways, and upon, through, or over any other land, subject to the rights of the owners for full compensation for the use, the court held that statutes which give the right of eminent domain are not to be enlarged by construction, and that a right to condemn a way over public roads did not include railroads outside of streets and highways; that, whatever it might signify, it was an inappropriate expression to designate a thing so long and commonly known by another name as a railroad, and that if the legislature had intended to authorize the use of railroads, they would have said so in plain language, and they would have prescribed the mode of the joint use so as not to endanger the safety of the operation of the railroad, as they have been careful to do in analogous cases. A cognate decision as to the strict construction of such statutes was reached in a case in Virginia.[3] In this case Sections 1287 to 1290 of the Code of Virginia were considered, which provide that every telegraph or telephone company incorporated by that or any other State or by the United States, may construct, maintain, and operate its lines along any of

[1] See statutes, *supra*, § 62.

[2] New York City & Northern R. R. Co. *v.* Central Union Telegraph Co., 21 Hun, 261. Cf. *post.* § 153.

[3] Postal Telegraph Cable Co. *v.* Norfolk & Western R. R. Co., 88 Va. 920.

the State or county roads or works, and over the waters of the State, and along and parallel to any of the railroads of the State, provided that the ordinary use of such roads, works, railroads, and waters be not thereby obstructed, and along and over the streets of any city or town with the consent of the council thereof, and which further provide for the condemnation of a right of way on making a just compensation therefor. In the case in question, the railroad company refused to allow the telegraph line over its right of way, on the ground that it had already contracted with another telegraph company for this use, and a second would obstruct the ordinary use of the road. The court considered the matter at some length, but finally decided the case upon the ground that the phrase "along and parallel to" the railroad meant along by the side of and not "along and upon," as was shown by the variation in language between this phrase and the phrase giving a similar right as to public highways, where the word "along" is used only, and consequently that the statute in question did not give the telegraph company a right to condemn its way upon the railroad right of way, but alongside of it.

§ 120. **Right to Condemn not defeated by Exclusive Contract of other Telegraph Company.** — It has been already seen [1] that the federal franchise of telegraph companies, and the general rules of public policy forbid a railroad company to grant an exclusive right to any telegraph company of constructing its lines over the railroad company's right of way. Accordingly, proceedings to condemn such a right cannot be defeated by any contract or agreement granting such exclusive right to any other telegraph company, whether this contract be set up by the telegraph company or the railroad company.[2] But if the railroad company has gone into the

[1] *Supra*, § 45.

[2] Postal Telegraph Cable Co. *v.* Norfolk & Western R. R. Co., 88 Va 920; *supra*, § 45, and cases there cited.

hands of a receiver appointed by the federal court, proceedings to condemn in a State court cannot be instituted without the consent of the receiver.[1]

§ 121. **Right condemned must not interfere with Use of Railroad.** — It is a general principle of the law of Eminent Domain that property already applied to a public use cannot be condemned for another public use which will extinguish or defeat the prior use,[2] and therefore if, as a matter of fact, the telegraph company would, if allowed to build its lines, interfere with the practical operation of the railroad, it cannot be allowed its right of way.[3] This case is not likely to arise, as in most cases there is plenty of room on railroad rights of way for any number of telegraph lines.[4]

§ 122. **Compensation to Railroad.** — The telegraph company which thus condemns a right of way over a railroad company's location is bound to make compensation to the railroad company, as provided by the statutes.[5] The value of the property which is taken when a telegraph line is placed over a railroad way is to be decided by whatever tribunal is appointed for this purpose under the statutes, on such evidence as is admitted upon similar questions of value. The most reliable evidence has been said to be the opinion of skilled persons who are familiar with values.[6] The test of the value of this right of way is what it was worth to the railroad company for any use or for sale, and any damage in addition to the loss of the use and the loss of its salability.[7]

§ 123. **Compensation to Owners of Adjoining Land.** — Whether the construction and operation of a telegraph line

[1] Western Union Telegraph Co. *v.* Atlantic, etc., Telegraph Co., 7 Biss. (U. S.) 367.

[2] Mill's Em. Dom., § 47. Cf. Balt. & F. Turnp. R. *v.* Balt. etc. Ry. Co., 31 Atl. R. 854.

[3] Postal Telegraph Cable Co. *v.* Norfolk & Western R. R. Co., 88 Va. 920.

[4] Cf. *post.* § 127.

[5] *Supra*, §§ 69–82.

[6] Postal Telegraph Cable Co. *v.* Alabama & Vicksburg Ry. Co., 68 Miss. 314.

[7] Ibid.

upon and along the right of way of a steam railroad company (supposing that company to have only an easement in the land and not the fee) constitutes an additional servitude upon the land underneath for which the owners of the land may demand compensation, or which they may restrain by injunction of a court of equity, depends upon the use which is made of the telegraph line or the purpose for which it is constructed. If the telegraph line is to be operated (and the same is true of telephone lines) *bona fide* in the management of the railroad only, the line constitutes no additional servitude, even though it may be constructed and operated by a telegraph or telephone company which owns the line but operates it for the railroad company.[1] The first case on this point was a case in Kansas.[2] In this case the plaintiff company had a line of railroad, and began to build a line of telegraph on it. Defendant cut down two or three of its poles which were either on or near the right of way of the railway company. The railway company then secured an interim injunction against him, and this discussion arose on a motion to dismiss the injunction. The affidavits of the defendant made it uncertain whether or not the plaintiff company had the right to build its telegraph line, *i. e.*, whether the line was to be operated as a commercial line or only to run the trains. The court held that, considering the circumstances of the case, the great danger and inconvenience to the plaintiff company if it did not get its line built, and the comparatively slight injury to the defendant by preventing him from cutting down the poles, the injunction should not be raised.

§ 124. **Compensation to Abutting Landowners** (*continued*). — A later case in the same State[3] following Dryden's case,

[1] American Telephone & Telegraph Co. *v.* Pearce, 71 Md. 535 Western Union Telegraph Co. *v.* Rich, 19 Kan. 517.

[2] St. Joseph & Denver City R. Co. *v.* Dryden, 11 Kan. 147

[3] Western Union Telegraph Co. *v.* Rich, 19 Kan. 517

held that a railway company may use its right of way for a telegraph line for its own business, that is, to facilitate the running of its trains, and that it may do so in partnership with a telegraph company if it so desires. The court says, "A telegraph line, if not indispensable to a railroad, tends so much to facilitate its business and to the speedy and safe running of its trains, that the railroad company has a right to build it, to use its right of way therefor, and to remove all obstructions thereon to its fullest and most uninterrupted and beneficial use. Although it may have but an easement in the land, and that easement limited to its use for railroad purposes, yet a telegraph is so convenient, if not indispensable, that it may cut down every tree and bush on the right of way, if necessary, for the most convenient and efficient use of a telegraph line built by it on and upon said right of way, and just as it may dig away a hill or fill up a ravine for the sake of a water-tank or a station-house. By so doing it gives the adjacent landowner no claim for damages, since the use is contemplated in the original condemnation, and the damages resulting therefrom are part of the damages included in the amount thereof. In short, the railroad company may use its right of way not merely for its tracks, but for any other buildings or erections which reasonably tend to facilitate its business of transporting freight and passengers, and by such use in no manner transcends the purpose and extent of the easement or exposes itself to any claim for additional damages to the original landowner, so that if the railroad company had built this line by itself independent of the defendant, and in doing so had only cut down trees upon its right of way, it is clear that the plaintiff would have no cause of action therefor. Does the fact that it took a partner in the construction and use of the telegraph expose it or such partner to any liability to the landowner for the full value of the trees cut down upon its right of way? We think not. If the railroad company could build by itself

without liability, it did not assume liability by building with another. Whatever it could do and would have done for its own use and benefit, and was so done, was, so far as the landowner is concerned, *damnum absque injuria*, no matter who bore the expenses, or perhaps more correctly, it was damages already paid for. We do not question that every additional burden cast upon the land outside of the purpose and scope of the original easement, no matter in whose behalf, gives the landowner new claims to compensation, but such compensation is limited to the extent of the additional burden." This case and opinion were cited with approval in a recent case in Maryland.[1] This was a number of suits by various landowners to enjoin the setting of telephone poles over the right of way of a railroad over their land without compensation, the plaintiffs alleging an *additional* servitude to be thereby cast upon their land. The court held that the railroad might undoubtedly, without additional payments to the landowners, run a line of telegraph or telephone over its right of way for the purpose of carrying on its railroad business, and it might employ another company to build the line or do so jointly with it, and that in every case it is a question of fact whether the railroad company is acting *bona fide* for this purpose. If it is in fact engaging in a commercial business, the landowners are entitled to additional damages. The court also held that the Act of Congress relating to telegraph lines[2] does not give such companies an actual right to build regardless of the landowner's consent, but only that, if they gain the consent of the landowners, no State legislation shall forbid the construction of the line. The court then examined the facts in the case, and held that as the railroad company in question had carried on its railway business for a number of years with only one line of telegraph, and was, at the time of the

[1] American Telephone & Telegraph Co. *v.* Pearce, 71 Md. 535.

[2] U. S. R. S., 5263.

suit, proposing to put up poles with crossarms ten feet wide, and capable of carrying fifty or sixty wires without any corresponding enlargement of its railway business, it was unquestionably going into a telephone business commercially, and therefore the injunction should be granted.

§ 125. **Compensation to Abutting Landowners.** — These cases settle the point that the landowner cannot claim additional compensation for or injunction against the building and operation of a telegraph or telephone line over the right of way of a railroad company if the telegraph or telephone line is wholly intended for and used by the railroad company in the management and operation of its railway, but if there is an additional use for commercial purposes, there is an additional burden thrown upon the land for which the landowner may demand and receive compensation, or on failure thereof may enjoin the construction or operation.[1]

§ 126. **Electric Light Poles are an Additional Servitude.** — The setting of electric light poles by town or city authorities for the sole purpose of lighting the public ways and places, is not a taking of private property for public use, since the use of the streets for this purpose is in the nature of an exercise of the police power by the city which is always valid without compensation to the landowner.[2] When the poles are set by an electric light corporation, however, for its own corporate purposes, *i. e.*, for supplying light to individuals and firms commercially, as well as lighting public ways and places, it has been held that the poles constitute an additional easement in a highway for which the owner of the fee may demand compensation.[3] Few cases have been decided on

[1] American Telephone & Telegraph Co. *v.* Pearce, 71 Md. 535; Western Union Telegraph Co. *v.* Rich, 19 Kan. 517; St. Joseph & Denver City R. Co. *v.* Dryden, 11 Kan. 147.

[2] See *post*, Municipal Ownership, ch. VII.

[3] Haverford Electric Light Co. *v.* Hart, 13 Pa. Co. Ct. Rep. 369; Tiffany *v.* U. S. Illuminating Co., 51 N. Y. Super. Ct. 280. Cf. People *v.* Thompson, 32 Hun, 96.

this point. On principle it would seem as if electric light poles set for the purpose of lighting the highways, were fully as germane to the original purposes for which the highway was dedicated as electric railroads are, for the lighting of highways is almost a necessity to their use at all, and is certainly necessary for their convenient and safe use. Possibly the distinction which has been taken as to gas-posts and pipes may be applied to electric poles and lamps, *i. e.*, that they constitute an additional servitude on country roads, but not on city streets, because the country roads are not generally lighted, nor is it so necessary or desirable, while in the case of city streets the necessity for lighting is absolute.[1]

§ 127. **Condemnation of one Street Railway by Another.** — In Ohio a statutory power exists whereby one street railway may, by the right of Eminent Domain, gain a right to operate its cars upon and over the tracks of another railway company. This extends, however, only so far as to allow the two roads to operate cars over the track jointly, and would not be extended so far as to deprive the earlier road of the right to operate its cars;[2] for it is a principle governing the law of Eminent Domain that if property already appropriated to a public use be condemned for a second use, the later condemnation must be so limited as not to interfere with the prior use.[3]

§ 128. **Failure to agree with Owner.** — In many States the exercise of the right of Eminent Domain is conditional upon a prior attempt and failure to acquire the rights or property desired by agreement with the owner.[4] In such case an attempt to agree is an absolutely necessary prerequisite to the exercise of the right to take. This prerequisite may arise from a direct statement to that effect in the statute, or

[1] Bloomfield Gas Co. *v.* Calkins, 62 N. Y. 386. Cf. Bloomfield Gas Co. *v.* Richardson, 63 Barb. 437. Compare *ante*, § 117.

[2] Toledo Electric Street Railway Co. *v.* Toledo Consolidated Street Railway Co., 26 Wkly. Law Bul. 172. Cf. *supra*, § 121.

[3] Cf. *supra*, § 121.

[4] See statutes, *supra*, ch. IV. *passim*.

by the use of phrases which imply an unsuccessful attempt at purchase, as, for instance, if the right to take by Eminent Domain is granted "upon failure to agree" with the owner as to the value of the property to be taken, or if the company cannot agree, or similar words. In every such case, the power to buy is conferred by implication, and an attempt to buy is a prerequisite to the exercise of the right of eminent domain.[1] A sufficient compliance with the condition is shown if the company has written letters making propositions as to such purchase, and mailed them duly addressed to the owner of the land, and has had no answer within a reasonable time.[2]

§ 129. **Easement only acquired by Condemnation.** — In Illinois, it is held that when a telegraph company is given a statutory power to condemn as a right of way for its tele-

[1] Louisville, N. O. & T. Ry. Co. *v.* Postal Telegraph Cable Co., 68 Miss. 806.

[2] Louisville, N. O. & T. Ry. Co. *v.* Postal Telegraph Cable Co., *supra.* In a case in New York an attempt was made to use the written consent of an abutting landowner to the construction of an electric street railway, as a grant from her of a right to lay the tracks over her land. The consent used was in the following form, and was but one of many obtained by the company: "I hereby grant to the Rochester Railway Company the right to construct, maintain, and operate a double track railroad upon Plymouth Avenue from the bridge over the abandoned Genessee Valley Canal to the south end of Plymouth Avenue, such railroad to consist of a single track on each side of the roadway, and to be operated by electricity as a motive power." This document was signed by a large number of abutting landowners. As a matter of fact, Plymouth Avenue in front of the plaintiff's land was not wide enough to allow a double track, one on each side of the roadway, and it would be necessary either to lay the second track upon the roadway or upon the plaintiff's land. The company chose to interpret the above consent as a grant of a right to them to lay the second track over the plaintiff's land in case the street was not wide enough to carry both, one on each side of the roadway; but the plaintiff brought suit to enjoin this construction, and the court held that it was evident that the document in question was a mere form of consent and was not intended to grant any right over the plaintiff's land outside of the roadway, but, as it expressly stated, a double track "upon Plymouth Avenue." Curvin *v.* Rochester Railway Co., 78 Hun, 535.

graph a strip of land a designated number of feet wide, the telegraph company does not acquire by such condemnation the fee of the land, but merely the right to set its poles and string its wires thereover, and to enter upon the same for the purposes of repair and renewal. It has no obligation, therefore, to fence the land which it does not own.[1] Generally the company does not acquire any definite number of feet of land, but merely an easement to place its poles and string its wires.

§ 130. **Proceedings must follow Statutes.** — All proceedings under the law of Eminent Domain, instituted by an electric company for the purpose of obtaining the right to set its poles and string its wires by virtue of statutory authority, must conform strictly to the provisions of the statute authorizing and regulating the subject. Thus, for instance, if a statute authorizes telephone companies which have been incorporated under the laws of the State enacting the statute to proceed by petition to condemn a right of way, the petition must allege affirmatively that the petitioning corporation was incorporated under the laws of the State in question, and if the statute requires the consent of the local authorities to the setting of the poles before the assessment of the damages to the landowner for such setting can be made, the petition for the assessment of such damages must allege the fact that the local authorities have so assented to the location of the poles in question.[2]

§ 131. **The Petition.** — The petition should set forth a reasonably accurate and precise description of the location of the poles in question, at any rate sufficient to show what burden is imposed upon the land by the setting of the poles and the stringing of the wires.[3] A mere reference in the petition to

[1] Lockie *v.* Mutual Union Telegraph Co., 103 Ill. 401.

[2] State, Winter *v.* New York & New Jersey Telephone Co., 51 N. J. L. 83.

[3] Broome *v.* New York & New Jersey Telephone Co., 49 N. J. L. 624; State, Winter *v.* New York & New Jersey Telephone Co., 51 N. J. L. 83.

a map which has dots on it indicating the location of the poles, has been held not sufficient. The petition or its accompanying schedule or map should show by scale the position of the poles on the highway, and also give a description of their size and other characteristics, their height, and the number and size of the cross-arms, and the number of wires to be sustained, these particulars being necessary in order to arrive at an estimate of the additional servitude imposed upon the land.[1] If the statute requires the consent of the municipal authorities to the location as a prerequisite to the taking by eminent domain, such consent must be alleged and proved. Thus in a case in New York an electric railway company had, after duly incorporating, proceeded to secure the rights of way by condemnation, and had built its road. It then desired to make an extension partly over a road which was owned by a Turnpike Corporation, and partly on adjoining land of various landowners. It procured the consent of the Turnpike Company to its occupation of the turnpike with its tracks, but failed to secure the consent of some of the landowners; nor had it obtained the consent of any town officials. It proceeded under the statutes to bring a petition in court for a condemnation of the right of way over the land of the objecting landowners. In answer to the objection that the consent of the local authorities had not been procured previous to beginning the proceedings for condemnation, the railway company attempted to set up that in this case, as the land was not in any village or city, there were no authorities whose duties and powers would give them the right to consent to the location in question. But the court held that when the highway over which the road proposes to go is not in any city or village, but is in a town, and runs over a turnpike owned by a Turnpike Corporation, the consent of the Turnpike Company, even though it has

[1] New York & New Jersey Telephone Co. *v.* State, Broome, 50 N. J. L. 432.

the actual control and ownership of the highway, is not a sufficient compliance with the statute which requires a consent of the local authorities. These words mean the officers of the city, town, or village whose duties and powers relate to the supervision, care, and maintenance of streets and highways, and in towns mean the Board of Highway Commissioners. Their consent is an essential prerequisite to any proceeding for the condemnation of the right of way.[1]

[1] Rochester Electric Railway Co., *In re*, 123 N. Y. 351.

CHAPTER VI.

GRANT OF FRANCHISE BY MUNICIPAL AUTHORITIES.

§ 132. Grant by Municipal Authorities.
133. Statute, Alabama.
134. Statutes, California.
135. Statutes, Colorado, Connecticut.
136. Statutes, Florida, Illinois, Indiana.
137. Statutes, Iowa, Kansas, Kentucky.
138. Statutes, Louisiana, Maine, Maryland, Massachusetts, Michigan.
139. Statutes, Mississippi, Missouri, Nebraska, New Hampshire.
140. Statutes, New Jersey, New York, North Carolina, Ohio, Pennsylvania.
141 Statutes, Rhode Island, Texas, Vermont.
142. Statutes, Virginia, Washington, West Virginia.
143. Statutes, Electric Railways.
144. Municipal Consent always necessary to the Use of Highways.
145. Whether Municipality has Power to authorize such Use.
146. Power of Municipality to grant Franchise.
147. Delegation of Powers.
148. Mode of granting Franchise; Fraud, Duress.
149. Stipulations in grant of Franchise.
150. Use of Poles by another Company.
151. Extraneous Stipulations.
152. Can Municipal Authorities refuse a Location of Poles.
153. Interpretation of Municipal Grants.
154. Discretion of Local Authorities conclusive.
155. Proceedings must follow Statutes.
156. Poles on Private Land.
157. Sale of Franchise at Auction.
158. Assignability of Franchise.
159. Revocation of Right to set Poles.
160. Grant of Location may be revoked, when.
161. Location of Poles, when revocable.
162. Underground Wires.
163. Permissive Statutes for Underground Wires.
164. Mandatory Statutes.
165. Same Subject (*continued*).
166. Constitutionality of Underground Statutes.
167. Cases on Underground Statutes.
168. Exclusive Franchises.
169. Exclusive Grant for Telegraph by Act of Legislature.
170. Exclusive Right of Way for Telegraph by Contract.
171. Grant of Monopoly separable.
172. Exclusive Right in Telegraph Company.
173. Exclusive Grants by Municipal Authorities.
174. Arkansas, Kansas, Louisiana.
175. Missouri, Ohio, Tennessee, Texas, Virginia.
176. Intent to grant Exclusive Privilege not Inferred.
177. Exclusive Grant not implied.
178. Exclusive Franchise for Street Railway sustained.
179. Interpretation of Exclusive Rights.
180. Exclusive Right by Statute.
181. Right to use Electricity for Lighting.
182. Right to use Electricity as Motive Power. Street Railways.
183. Right to set Poles and string Wires as incidental.
184. Inferred Right to use Electricity.
185. Inferred Right to use Electric Motive Power (*continued*).
186. Grant of Right by Municipality only.
187. Right to use any Motive Power.

§ 132. **Grant by Municipal Authorities.** — In most States the statutes under which telegraph, telephone, and other electric companies acquire the right to set poles and string wires in, or otherwise occupy, public highways, either annex a condition that the right shall be acquired only subject to the approval or by the consent of the municipal authorities, or delegate to such authorities the power to make the grant. This procedure is intended to secure to the municipalities such regulation of the manner of occupation of the highways as will insure the safety and convenience of the public and of the inhabitants of the municipality in using the highways. In the following sections are given the provisions of the State statutes on this subject, so far as they are expressly enacted in relation to telegraph or other electric companies by name, and it will be perceived that in by far the greater majority of the States, this condition is expressly affixed to the franchise or right of way of telegraph companies, and, as included in the same class, telephone companies, and in quite a number of States, the express statutory provisions cover all electrical wires in the public highways. Even where express statutory provisions on this point do not exist, the statutes relating to municipal corporations generally vest the regulation of electric lines in the highways in the municipal governments among their general police powers for the lighting, care, and regulation of streets and public places.[1] The statutes relating to such municipal control are very numerous, and as they are generally uniform in purport, it is considered unadvisable to incorporate them into this work, except in instances where electric companies are expressly mentioned, which are as follows: —

§ 133. **Statute, Alabama.** — In this State street railroads are given the right to use electric force as a motive power, and the right to condemn a right of way thirty feet wide on making compensation therefor; but incorporated cities

[1] Dillon, Mun. Corp., § 691.

and towns may regulate the construction of street railways within their corporate limits, and the kind of motive power to be used by them.[1]

§ 134. **Statutes, California.** — In this State the statutes provide that any privilege of stringing telegraph or telephone wires or constructing or operating railroads in the public highway, may be granted by the governing or legislative bodies of the city, town, district, or county in which it is to be exercised only by public advertisement, and must be granted to the highest bidder after due publication.[2] And further provision is made for electric railways obtaining a right of way through the highways, not exceeding fifty years in duration, from the trustees, council, or other governing body, under such restrictions and limitations, and upon such terms and payment of license tax, as such body may require.[3]

§ 135. **Statutes, Colorado, Connecticut.** — In Colorado no poles or wires can be erected in any streets or alleys of any city or incorporated town, without having first obtained the consent of the city or town.[4] In Connecticut the selectmen of a town, the common council of a city, and the wardens and burgesses of a borough have full direction and control over the placing, erection, and maintenance of all kinds of electric wires, conductors, fixtures, and apparatus, including relocation and removal, subject to appeal to a judge of the Supreme Court of the county.[5] Street railways are authorized to use electricity.[6]

§ 136. **Statutes, Florida, Illinois, Indiana.** — In Florida telegraph and telephone companies must obtain from the city or town council of any incorporated city or town, permission to occupy the streets.[7] In Illinois telegraph companies are

[1] Laws 1889, No. 65.
[2] Stats. 1893, ch. 204.
[3] Stats. 1891, chs. 18, 19; Stats. 1893, ch. 175.
[4] Ann. Stat. § 595.
[5] Gen. Stats. §§ 3946, 3947, 3950, 1477.
[6] Stats. 1893, ch. 193.
[7] Rev. Stats. §§ 2252, 2256.

required to obtain the consent of the corporate authorities of any incorporated city, town, or village, to the erection of poles and other structures on the streets, alleys, and public highways thereof, and outside the corporate limits the consent of the county board.[1] In Indiana the common council of an incorporated city, and the trustees of an incorporated town may, by resolution or ordinance, grant the right to erect and maintain the poles and wires for electric lighting in streets, alleys, and public places.[2]

§ 137. **Statutes, Iowa, Kansas, Kentucky.** — In Iowa the statutes provide that in cities of the first class and of the second class, having over seven thousand inhabitants, and in cities especially chartered, the power to regulate electric wires and to provide the manner in which and the places where they shall be placed on the streets, is given to the board of public works, with the assistance of the city engineer, and subject to the ordinances of the city.[3] Street railways are given the right to use electricity.[4] In Kansas the mayor and council of cities of the first class have the power to grant the right of way for telegraph, electric light, and telephone lines on the highways, and change, modify, or regulate the same.[5] And the council of any city or trustees of any incorporated town or village may specify the locations and other details of telegraph poles and wires.[6] In Kentucky all electric wires are to be placed subject to the consent of the proper legislative board of any city or town.[7]

§ 138. **Statutes, Louisiana, Maine, Maryland, Massachusetts, Michigan.** — Electric wires for the transmission of intelligence may be constructed along the streets of any city with the consent of the council or trustees thereof.[8] In Maine all electric wires upon highways and public roads of any

[1] Ill. Ann. Stat. ch. 134, ¶ 4; ch. 24, ¶ 63, cl. 17.
[2] Ann. Stats. § 4302.
[3] Ann. Code, §§ 725, 896.
[4] Acts 1892, ch. 22.
[5] Gen. Stats. § 555.
[6] Ib. § 1387.
[7] Const. §§ 163, 199.
[8] La. Acts 1880, No. 24.

city or town require a written permit signed by the mayor and aldermen, or selectmen, specifying the locations of the posts, the kind of posts and their height, and the location of the wires; and this permit is only granted after public notice and a hearing.[1] Similar provisions exist as to electric light companies in Maryland.[2] In Massachusetts telegraph lines and all other electric wires require a writing from the mayor and aldermen, or selectmen, specifying the locations of the posts and their kind, and the height and place of the wires.[3] In Michigan electric light companies are obliged to get permission to occupy streets.[4]

§ 139. **Statutes, Mississippi, Missouri, Nebraska, New Hampshire.** — In Mississippi the board of supervisors of a county, and the authorities of any city, town, or village, have the power to regulate the construction of telegraph lines and electric light lines in the streets.[5] In Missouri the consent of the city is required in case they desire to put their wires underground;[6] and the mayor and aldermen or common council of any city, or the trustees of any town, may, by ordinance or otherwise, specify the locations of the posts and their kind, and the height and location of the wires, of telegraph and telephone companies.[7] In Nebraska street railways are authorized to use electricity.[8] In New Hampshire all electric wires above or beneath the highways require the license of the selectmen of towns locating the route and the size and location of the poles and the number and height of the wires.[9]

§ 140. **Statutes, New Jersey, New York, North Carolina, Ohio, Pennsylvania.** — In New Jersey, telegraph and telephone companies require from the common council or other legis-

[1] Acts 1885, ch. 378, § 2.
[2] Pub. Gen. Laws, Art. 23, § 111.
[3] Pub. Stats. ch. 109, § 3; Acts 1889, ch. 434; Ib. ch. 398; Acts 1883, ch. 221; Acts 1887, ch. 385, § 4.
[4] How. Ann. Stat. § 4191.
[5] Ann. Code, §§ 855, 2933.
[6] Rev. Stats. § 2721.
[7] Rev. Stats. § 2730.
[8] Comp. Stat. ch. 72, Art. 7, § 12.
[9] Pub. Stats. ch. 81, § 2.

lative body of incorporated cities and towns, a designation of the streets in which the posts are to be erected, and the manner of placing them.[1] And it is the duty of such body to give a writing giving such designation, which must be done by ordinance, and it is unlawful for any company to construct its lines without having first obtained such designation, or outside of the streets designated.[2] But the legislative body must designate such streets as will form a practicable and suitable continuous line through the municipality, commencing and ending upon a public highway, and with due regard for facilities of communication, and in case of delay of fifty days in granting such a writing, application may be made therefor to the Circuit Court of the county.[3] Street railways are authorized to use electric motors.[4] In New York the consent of municipal authorities to setting electric light poles in highways is required.[5] Street railways are authorized to use electricity.[6] In North Carolina the consent of the authorities of any city, town, or village is necessary to the construction of electric light lines in the highways.[7] In Ohio the telegraph and electric light lines can only be built upon public highways within the limits of a city or village, in such manner as may be agreed upon with the municipal authorities, subject to appeal to the Probate Court.[8] In Pennsylvania the permission of the municipal authorities of any city, town, or borough is required for all electric light wires before they can be run over the streets, and this permission must be given by ordinance, and may impose conditions.[9]

§ 141. **Statutes, Rhode Island, Texas, Vermont.** — In Rhode

[1] Rev. Supp. p. 1022, § 1.
[2] Acts 1887, ch. 87.
[3] Laws 1888, ch. 337.
[4] Rev. Sup. p. 369, § 30.
[5] 2 N. Y. Rev. Stat., Birdseye Ed., p. 252, § 40.
[6] 3 Ib. p. 2492, § 321.
[7] Priv. Laws 1889, ch. 35, § 2.
[8] Rev. Stats., Smith & Ben., § 3461; Ib. §§ 8035–233; Laws 1891, p. 296; 1894, p. 205.
[9] Bright. Purd. Dig. Suppl. p. 2406; Acts 1889, No. 153, § 2.

Island all wires in the streets are subject to ordinances and regulations of the town and city councils.[1] In Texas the corporate authorities of any town, city, or village may, by ordinance or otherwise, specify the locations of posts and wires.[2] In Vermont, if it is desired to erect a line of telegraph or telephone on the streets of a village, the selectmen may regulate the manner of construction,[3] and may require new lines to be placed upon poles already standing, upon terms to be settled by the selectmen.[4]

§ 142. **Statutes, Virginia, Washington, West Virginia.** — In Virginia telegraph and telephone lines on the streets of a city or town require the consent of the council.[5] In Washington telegraph or telephone lines on public ways, within the corporate limits of any incorporated city, require the consent of the city council thereof.[6] In West Virginia telephone lines on county roads require the consent of the County Court, and on streets in any incorporated city, town or village, the consent of the council.[7]

§ 143. **Statutes, Electric Railways.** — In the following States constitutional or statutory provisions exist which require the consent of the municipal authorities to the construction and operation of street railways upon and over the highways: Alabama,[8] Arkansas,[9] California,[10] Colorado,[11] Georgia,[12] Illinois,[13] Indiana,[14] Iowa,[15] Massachusetts,[16] Michigan,[17] Missouri,[18] Montana,[19] Nebraska,[20]

[1] Pub. Stats. ch. 38, § 20.
[2] Sayles' Ann. Stats. Art. 626.
[3] Rev. Laws, § 3635.
[4] Ib. §§ 3645–3648; Laws 1888, No. 32; Laws 1884, No. 47; Laws 1884, No. 23; Laws 1882, No. 74.
[5] Code, § 1287.
[6] Hill's Stats. & Codes, § 1561.
[7] Code App. p. 1059, § 1.
[8] Const. Art. 14, § 24.
[9] Dig. Stat. § 5469.
[10] Cir. Code, § 497.
[11] Ann. Stat. § 501.
[12] Laws 1891, p. 168.
[13] Ann. Stats. c. 32, ¶ 28.
[14] Ann. Stats. § 5464.
[15] Laws 1890, p. 19, ch. 11.
[16] Pub. Stats. ch. 113, § 7.
[17] Ann. Stat. § 3548.
[18] Rev. Stats. §§ 8298, 8300.
[19] Const. Art. 15, § 12.
[20] Comp. Stats. Con. p. 37, § 2.

New Jersey,[1] New York,[2] Ohio,[3] Pennsylvania,[4] Tennessee,[5] Texas,[6] Washington.[7]

§ 144. **Municipal Consent always necessary to the Use of Highways.** — It will be observed that most of the statutes, of which abstracts are given in the preceding sections, have a double effect: First, of prohibiting the use of highways within municipalities for the use of electric lines without the consent of the municipal authorities; and second, conferring on the municipal authorities the power to authorize or regulate this use. The former branch of this rule is true in all cases, whether expressly so stated in the statutes or not, unless the company has direct legislative authority, and no electric company can use the streets for the erection of its poles and wires without direct legislative authority so to do, or the permission of the municipal authorities.[8]

§ 145. **Whether Municipality has Power to authorize such Use.** — The statutes given above show that express authority to regulate the use of the highways for electric lines is by statute generally given to the municipal authorities. This is especially true of telegraph and telephone lines. As to electric railway companies, the statutes authorizing the construction of street railways generally confer upon the municipal authorities similar powers of regulation.[9] As to electric light companies, the power of municipal authorities

[1] Rev. Suppl. p. 364, § 8.
[2] 3 Rev. Stat. Birds. p. 2492, § 323.
[3] Rev. Stat. §§ 2501, 3438.
[4] Laws 1889, p. 217, § 15.
[5] Code, § 1921.
[6] Const. Art. 10, § 7.
[7] Hill's Stats. & Codes, § 520.

[8] Dillon, Mun. Corp. §§ 691, 698, 701, 708, 717, 726. When it is intended to thoroughly reconstruct or rebuild a street railway line, so as to substantially change its character, as by putting in heavier rails, etc., this requires an additional permit or franchise if the statutes give the city authorities the right to prescribe the manner of digging up streets, etc. The mere repairing of the road does not require this, as, for instance, putting in a new sleeper or a new rail here and there, but a thorough reconstruction, especially if it substantially blocks up the use of the street, does. Trenton *v.* Trenton Passenger Railway Co., 27 Atl. Rep. 483.

[9] Booth, St. Rys., §§ 28-32; *supra*, § 143.

to regulate the setting of poles and stringing of wires for this purpose is often given by express statutes,[1] and if not, it is generally inferred from a power to light the streets and public highways.[2] In cases of implied powers of regulation questions of construction of the statutes often arise as to the existence of the powers in the municipal authorities, as to which the law is as follows: —

§ 146. **Power of Municipality to grant Franchise.** — The public easement of travel over the highways is vested originally in the public, and nothing short of an exercise of the sovereign power can divest it. The legislature, representing the public, may restrict the public use by granting a right to erect poles and string wires therein.[3] What the legislature may thus do, it may delegate authority to do, by conferring the authority upon municipalities.[4] This delegated power of municipal authorities to grant franchises to electric companies to use the highways for the setting of poles and stringing of wires, laying tracks, and other purposes incidental to the carrying on of the business of the companies, may be delegated by the legislature to the municipal authorities in one of three ways. First. It may be expressly granted in the charter of the city or town, or in legislative acts, either general or special, affecting this subject or relating to the company which desires the right. Second. Such authority may be fairly implied from the language of the express provisions of such charters or legislative acts. Third. Such authority may be implied from the nature of the case when it is absolutely necessary for carrying out the purposes

[1] See statutes, *supra*, §§ 133–142.

[2] Dillon, Mun. Corp., §§ 691, 692; and see *post*, Exclusive Rights, § 177, and Municipal Ownership, ch. VI.

[3] State, Domestic Telegraph & Telephone Co. *v.* Newark, 49 N. J. L. 344; Jersey City Gas Co. *v* Dwight, 29 N. J. Eq. 242; *supra*, § 60.

[4] Ib. p. 346. And in the absence of such delegation, the consent or permission of the municipal authorities is invalid, as against the State. Ib. p. 347; Detroit *v.* Detroit City Railway Co., 56 Fed. Rep. 874.

of the municipal charter. The mere convenience which may arise from the implication of such powers is not sufficient to authorize them. It must be an absolute necessity.[1] Instances of the grant of such power by implication from the language of a statute are these: It has been held that a charter giving a city the right to construct and keep in repair all bridges, streets, sewers, and drains, and to regulate the use thereof, gives the municipal authorities the right to regulate the manner of stringing the wires of an electric light company so as to avoid danger by contact with or proximity to the wires of the telegraph company below.[2] Under a charter power "to authorize the use of the streets for horse and steam railroads, and to regulate the same," coupled with power to restrict and regulate the operation of the cars, the court held that a power was implied to grant a franchise for the use of the streets by an electric street railway, on the ground that the words "horse" and "steam" were not words of limitation, but of illustration; that the meaning of the legislature must have been to grant to the common council the authority to grant the use of the streets for railroads propelled by any motive power; and that only two were specified because at the time of the grant only these two were known; and that if the legislature had meant to prohibit the adoption of motive powers which might be subsequently discovered, they would have been more likely to insert an express prohibition to that effect; and that the public good, as well as the probable meaning of the legislature, both tended to the construction of the act which would give the street railroad companies the right to use any motive power.[3] A charter power to regulate streets, and

[1] State, Domestic Telegraph & Telephone Co. *v.* Newark, 49 N. J. L. 344; Morris & Essex R. R. Co. *v.* Newark, 10 N. J. Eq. 352, 363; Pennsylvania R. R. Co.'s App., 93 Pa. St. 150, 159. See also *post*, § 153.

[2] Western Union Telegraph Co. *v.* Guernsey & Scudder El. Light Co., 46 Mo. App. 120.

[3] Buckner *v.* Hart, 52 Fed. Rep. 835. Compare, however, *post*, §§ 184 *et seq.*

prevent and remove obstructions therefrom, or to prevent or regulate the erection of any signs, posts, or projections over and upon any street, has been held not sufficient to authorize setting telephone poles.[1] But though a mere power to regulate the use of streets may not give to the municipal authorities a right to make a grant of a location of poles in such a sense as constitutes an easement or a contract irrevocable by the municipality, yet it may be sufficient to authorize the existence of the poles in the streets as a mere license, revocable by the municipality.[2] These questions of construction of statutory authority occur in almost every case involving the right to set poles. Important classes are inferences of the right to use electricity to propel street cars,[3] and in cases where conflicts between the occupation of the streets by different kinds of electric wires arise.[4]

§ 147. **Delegation of Powers.** — As a general rule, when a legislature vests municipal authorities with certain power as to the regulation of the use of the streets and highways by electric companies, the authorities to whom such power is given cannot delegate these powers to one of their committees. The power is personal to the city authorities as a whole, and the legislature is supposed to have relied upon their discretion in the exercise thereof, and not to have meant that it should be exercised by committees of the city council.[5]

§ 148. **Mode of granting Franchise; Fraud, Duress.** — If there is no restriction in the statute delegating this power, or in other statutes relating to highways, as to the manner in which it shall be exercised, the common council may grant rights to set poles, string wires, or lay tracks in streets by resolution as well as by ordinance, for there is nothing in the nature of the subject-matter which requires the more

[1] State, Domestic Telegraph & Telephone Co. *v.* Newark, 49 N. J. L. 347.
[2] Detroit *v.* Detroit City Railway Co., 56 Fed. Rep. 874.
[3] *Post*, § 184 *et seq.* [4] *Post*, § 212 *et seq.*
[5] Citizen's Electric Light & Power Co. *v.* Sands, 95 Mich. 551, 560.

formal mode of grant; but if there are statutes which require all regulations of the use of the streets and highways to be by ordinance, such grants of location must be made by ordinance as being a regulation of the use of the streets;[1] but when the consent of a municipal board is required by statute, the consent of the board in its collective capacity is meant, and not of the individual members, and therefore the signing of a written consent by the individual members of a board is insufficient. The consent must be given at a meeting of the board duly held, and recorded in its records, if it has them, the latter being then the best evidence of the consent.[2] Any fraud or duress in obtaining the consent invalidates it, and therefore a consent of the township authorities which is obtained by bribing the township officers, either directly or indirectly, or by intimidating them, is invalid and void.[3] Thus where the consent of a town official was obtained by agreement on the part of a railway company to give him certain contracts for work, in his individual capacity, this was held to be an illegal inducement for his consent, and rendered the latter invalid.[4]

Although as a general rule the legality of the operations of a corporation under its charter and franchises can only be tested by the public authorities, yet if any individual or corporation suffers special damage from any alleged illegal proceedings, he or it has a right to institute proceedings for examining into the legality of the same. Consequently if a street railway company is excluded from the use of streets for its tracks by certain ordinances of the municipal authorities which have granted franchises in these streets to another street railway company, the former company may bring a

[1] Halsey *v.* Rapid Transit St. Ry. Co., 47 N. J. Eq. 380; Halsey *v.* Newark, 54 N. J. L. 102.

[2] Lehigh Coal & Nav. Co. *v.* Intercounty St. Ry. Co., 31 Atl. Rep. 471.

[3] Ibid.; Tamaqua & L. St. Ry. Co. *v.* Intercounty St. Ry. Co., 31 Atl. Rep. 473.

[4] Lehigh Coal & Nav. Co. *v.* Intercounty St. Ry Co., *supra*.

writ of *certiorari* to set aside the franchise of the other company on the ground of illegality.[1] Moreover, when the municipal authorities have been given by the legislature the right to grant to street railway companies franchises for laying tracks in the streets [and presumably the same is true of pole rights also for all electric companies], the exercise of this power by the municipal authorities by grant of a franchise as to any particular street or company is a judicial act, and not a legislative one, the distinction being said to be that a decision which affects all streets of a certain class is a legislative statute, while a decision affecting a particular street is a judicial proceeding. Therefore if one of the board making the grant is a stockholder in the company to which the grant is made, he is an interested judge in the matter, and this fact will be sufficient to set aside the grant of the franchise.[2]

§ 149. **Stipulations in grant of Franchise.** — Within what limits the municipal authorities may annex conditions and restrictions to the grant of pole rights and track franchises in the highways must depend very largely upon the statutes under which they act and constitutional provisions. Some statutes provide that the municipal authorities must grant a location, and may only designate the place of setting the poles, the kind and height of poles, and the number of wires, thus giving very little scope for other stipulations.[3] In many States, however, the municipal authorities are allowed to affix reasonable regulations to the grant of location.[4] It would seem that these regulations should be such as relate to the occupation of the street by the poles and wires or tracks, and the use of the highway by the electric company

[1] West Jersey Tr. Co. *v.* Board of Public Works, 29 Atl. Rep. 163.

[2] Ibid.

[3] Statutes *supra*, §§ 133-143; State, *ex rel.* Bell Telephone Co. *v.* Flad, 23 Mo. Ap. 185; Electric Ry. Co. of Grand Rapids *v.* Grand Rapids, 84 Mich. 257.

[4] Statutes, *passim.*

in a reasonable and proper manner.[1] Such stipulations in the case, for instance, of electric railways, may provide for the paving of that portion of the street occupied by the street railway company, or for the removal of snow and ice in winter, and similar provisions.[2] So in the construction of electric lighting lines, the grant of the municipal authorities may include conditions as to the size, shape, and number of the poles, the number of the wires, and the manner of stringing them, and similar provisions.[3]

§ 150. **Use of Poles by another Company.** — It has been held that when a common council was authorized by statute to permit the setting of poles and the stringing of wires of an electric light company within its jurisdiction, subject to reasonable rules and regulations, the common council might, in granting permission to set such poles, reserve the right to allow other companies to use the same poles; but if the council exercised this reserved right, and granted another company the right to use the same poles, the council must make such reasonable regulations for the use of the poles by the second company as would allow the joint use safely, such, for instance, as to the number of wires which the

[1] But see *post*, § 151.

[2] Benton Harbor *v.* St. Joseph & B. H. St. Ry. Co., 60 N. W. Rep. 758; Sioux City El. Ry. Co. *v.* Sioux City, 138 U. S. 98. And the company will be bound to obey these stipulations, and if proper conditions of revocation are inserted in the franchise or ordinance granting the location, such franchise or ordinance may be revoked by the city government for non-compliance with its condition. It does not, however, necessarily follow that the city government can maintain a mandamus to compel the railway company to perform this part of its contract, for it is a rule of law affecting this particular remedy, that it will not be allowed when the facts set up by the defendant show that the writ of mandamus, if issued, will be nugatory on account of the inability of the defendant to carry out the provisons of the contract. Thus where a writ of mandamus was applied for based on the agreement of the railway company to do such paving, the railway company showed that it was insolvent and unable to procure the money to do this work with, and the court refused the writ. Benton Harbor *v.* St. Joseph & B. H. St. Ry. Co., 60 N. W. Rep. 758.

[3] Citizens' Electric Light & P. Co. *v.* Sands, 95 Mich. 551.

second company might put upon the poles, the height of the cross-arms, time of use, etc.[1]

§ 151. **Extraneous Stipulations.** — Whether municipal authorities can affix to the grant of street franchises, extraneous stipulations as to the conduct by the electric company of its business, and wholly foreign to the franchise granted, is a question on which the authorities are not uniform. Thus, for instance, where a common council granted to a street railway company the right to build its road and set iron or wooden poles outside of the fire district, on condition that the railway company gave transfer tickets over certain streets, it was held that it was not within the power of the common council to affix this condition. It is to be noted that the statute in this case limited the municipal authorities to merely specifying the places, height, etc., of poles, and did not even grant the power to affix reasonable regulations to the grant.[2] On the other hand, a strong case in Pennsylvania has been decided to the effect that municipal authorities in granting such franchises may affix any stipulations thereto which seem to them advisable, though not connected in subject-matter with or relevant at all to the construction of the road, and that there is no limitation to this power unless perhaps in cases where the courts, in the exercise of their police power, may supervise such grants. In this case the State Constitution provided that no street railway should be constructed within the limits of any city, borough, or township without the consent of the local authorities, and the court held that this constitutional grant could not be interfered with, either by the legislature or the courts of law. The city, in making the grant to the railway company of the right to occupy streets, had added stipulations thereto regulating the fares which should be charged

[1] Citizens' Electric Light & P. Co. *v.* Sands, 95 Mich. 551.

[2] Electric Railway Co. of Grand Rapids *v.* Common Council of the City of Grand Rapids, 84 Mich. 257.

on the street railway line, and also requiring a certain percentage of the dividends to be paid into the city treasury. The court held that both of these provisions were valid exercises of the constitutional power, and could not be reviewed by the court.[1]

§ 152. **Can Municipal Authorities refuse a Location?** — Whether the municipal authorities can refuse, *in toto*, an application for a location on the highways by a company legally authorized to make such application must depend largely on the statutes. It would seem, in accordance with the cases heretofore cited relating to the federal franchise of telegraph companies,[2] that they could not refuse such an application by a telegraph company, since it is an instrument of interstate commerce.[3] In the case of electric light and electric railway companies, it would seem that, in the absence of inconsistent statutory provisions, the municipal authorities might in their discretion refuse such an application wholly. This point was considered in a case in which an electric light company sought for a writ of mandamus to compel the board of aldermen of a city to grant a location for its poles. The company based its application upon a statute granting to telegraph companies the right to set their poles in the highways subject to the designation of place by the aldermen, and upon a later statute providing that the acts relating to telegraph companies should so far as applicable, extend to lines for the transmission of electricity for the purpose of lighting. The court decided that the mandamus should not issue, placing the refusal upon either of two grounds. In the first place, that the matter of granting locations was left to the discretion of the aldermen of the city or the selectmen of the town, and that they might refuse wholly

[1] Alleghany City *v.* Millville, etc. Street Railway Co., 159 Pa. St. 411; and to the same general effect, West Side Street Railway Co. *v.* Barnard, 110 N. Y. 552.

[2] *Supra*, §§ 42–45, and cases therein cited.

[3] Cf. Suburban Light & Power Co. *v.* Boston, 153 Mass. 200.

to grant such location, in cases where it would interfere with public travel on account of the narrowness of the street, or for other reasons; and second, that even if it were considered imperative upon the municipal authorities to grant such location to telegraph companies, yet the reason for an imperative construction of this statute would not apply to electric light companies; that telegraph companies must in almost all cases run from town to town, and through different towns, and therefore it might be considered imperative that their locations should be granted by the selectmen of every town through which they would pass; but the same reason would not apply to electric lighting companies whose operations are usually confined to a single town or part of a single town, and are of local interest merely; and that so far as electric lighting companies are concerned, it must be taken to be the intent of the statute that the authorities of the town to which, ordinarily, the whole business of the electric lighting company is confined, should have the right to say whether or not any location of poles should be granted.[1]

§ 153. **Interpretation of Municipal Grants.** — A leading principle applicable in the interpretation of grants by municipalities of rights of way to electric companies is one which has been laid down in many cases in other branches of interpretation, viz., that no implication will be indulged in derogation of the rights of the public in the absence of express or plain terms in the grant. As against the public a grant of privileges will not be given a scope and effect beyond what the plain words require. This is an established principle applicable in the construction of grants by the State, and is equally applicable in the construction of grants and privileges by a municipal corporation affecting public rights.[2] But if there is a reservation in favor of the public

[1] Suburban Light & Power Co. *v.* Boston, 153 Mass. 200.

[2] North Baltimore Pass. Ry. Co. *v.* North Ave. Ry. Co., 75 Md. 243; State, Green *v.* Trenton, 54 N. J. L. 92; Halsey *v.* Rapid Transit St. Ry.

it will be literally construed. For instance, in a case where the statute gave street railway companies the right to lay tracks and operate their cars in the streets, subject to such regulations as the mayor and aldermen of the city might make, and the latter in granting the right to use the streets by ordinance reserved the right to let other companies use the same tracks, this reservation was held to be in favor of the public, and not to be construed in the narrow signification of meaning only such railroads as might be operated by similar motive power to that of the original railroad, but to include all kinds of street railroads.[1] Other principles of construction were discussed in an earlier section.[2]

§ 154. **Discretion of Local Authorities conclusive.** — When the statutes give the local authorities power to designate the location of the poles in the streets and public ways, this provision vests in them a discretion which is final, and will not be revised by courts unless it has been fraudulently exercised.[3]

§ 155. **Proceedings must follow Statutes.** — In all proceedings to obtain the consent of the local authorities the provisions of the statute must be substantially followed. Thus if the public way is in a town, and the statute requires in such case the assent of the town authorities, it will not be sufficient for the company to obtain the consent of the county authorities, and the setting of the poles with only such consent will be illegal.[4] So when the statute requires the consent of the "local authorities having control of the street

Co., 47 N. J. Eq. 390; Omaha Horse Ry. Co. *v.* Cable Tramway Co., 30 Fed. Rep. 324; Bridge Co. *v.* Hoboken, 13 N. J. Eq. 81, 94; Delaware & Raritan Canal & Camden & Amboy R. R. & Transportation Co. *v.* Camden & Atlantic R. R. Co., 16 N. J. Eq. 321, 372.

[1] North Baltimore Pass. Ry. Co. *v.* North Ave. Ry. Co., 75 Md. 233.

[2] *Supra*, § 146.

[3] Commonwealth *v.* Boston, 97 Mass. 555; Young *v.* Yarmouth, 9 Gray, 386; Gay *v.* Mutual Union Telegraph Co., 12 Mo. App. 491.

[4] State, Winter *v.* New York & New Jersey Telephone Co., 51 N. J. L. 83.

or highway," and specifies that in cities the common council and in villages the board of trustees shall be the local authorities for this purpose, but omits to specify what should be considered the local authorities in towns, it will not be sufficient for the company intending to set poles in a town to obtain the consent of a turnpike company having control of the highway over which the poles are to be set.[1]

§ 156. **Poles on Private Land.** — The question of how far an electric company which sets its poles on private land so near the edge of the highway that the cross-arms extend over the highway, is obliged to obtain permission of the public authorities for this use, was raised in a case in New Jersey.[2] In this case a telephone company desiring to run its line through a town made arrangements with the owners of land on one side of the street to set the poles on their land. The company then put on cross-arms which projected over the street, and hung the wires at a distance of twenty-five feet above the street surface. No consent of the town authorities was given or asked. The town threatened to cut down the wires. The telephone company got a preliminary injunction, and on hearing the court said that as the poles were not set in the street, there was no necessity for obtaining the consent of the municipal authorities, nor were the wires necessarily an obstruction to the street, but that as the municipal authorities were required by statute to make regulations as to any use of the streets by telegraph companies, they ought to make such regulations, and, when they were made, the telegraph company would have to comply with them; but that until they were made, as the wires did not obstruct travel in the street, they could remain.

§ 157. **Sale of Franchise at Auction.** — In several States statutes have been enacted requiring that the grant by municipal authorities of the right to use the streets for the tracks

[1] Rochester Electric Railway Co., *in re*, 123 N. Y. 351.

[2] American Union Telegraph Co. *v.* Harrison, 31 N. J. Eq. 627.

and poles of street railways or electric companies must be sold at auction to the highest bidder.[1] Generally speaking, in such a case the price of the franchise must be paid in money, and the city authorities have no right to accept the price in anything else. Thus in a case in Louisiana where such a statute was in existence, the city council offered the franchise for sale at auction to be paid for in gravel, and finally sold it to a certain person for so many cubic yards of gravel. The court held that this was *ultra vires* and void.[2]

§ 158. **Assignability of Franchise.** — A grant to a telephone, telegraph, electric light or railway company of the power to use the streets, highways, and post-roads for the stringing of its wires and the setting of its poles, contains so much of an element of personal obligation, that such a grant is not assignable unless such a power of assignment is expressed in the language of the grant, or in some general legislation affecting the subject.[3] If the grant is in terms to X., his successors and assigns, or similar language, it is assignable.[4]

§ 159. **Revocation of Right to set Poles.** — In considering whether a right granted by municipal authorities to set poles and string wires in a public highway may be revoked after it has been granted, several points must be considered. Generally speaking, the grant of the right, when it has been duly accepted by the company, becomes a contract between the municipality and the company, and cannot be revoked, or it may be considered as a grant of a property right, which, once made, cannot be withdrawn at the volition of

[1] See statutes referred to in §§ 133–143, *supra;* Booth Street Railways, §§ 25, 26.

[2] Buckner *v.* Hart, 52 Fed. Rep. 835.

[3] United States *v.* Western Union Telegraph Co., 50 Fed. Rep. 28, 30; Atlantic & Pacific Telegraph Co. *v.* Union Pac. Ry. Co., 1 Fed. Rep. 745; Western Union Telegraph Co. *v.* Union Pac. Ry. Co., 3 Fed. Rep. 1.

[4] Toledo Consol. St. Ry. Co. *v.* Toledo El. St. Ry. Co., 6 Oh. Cir. Ct. Rep. 362; California State Tel. Co. *v.* Alta Tel. Co., 22 Cal. 398; Newman *v.* Village of Avondale, 31 Weekly L. Bull. 123; Atkinson *v.* Asheville St. Ry. Co., 113 N. C. 581.

the grantor. Considering it in either of these ways, it is irrevocable unless a power of revocation is expressed in the statute authorizing the grant or in the grant itself.[1] In many States the statutes which grant the franchise to electric companies, expressly state that it is subject to revocation or alteration by the municipal authorities.[2]

§ 160. **Grant of Location may be revoked.** — The grant of the right to place the poles, etc., in a highway should be distinguished from the original franchise of being a corporation, with the necessary incidental powers thereto appertaining granted by the State. The latter kind of corporate franchise can only be revoked by the State itself in a direct proceeding for this purpose, and cannot be attacked collaterally. The franchise granted by municipal authorities for setting poles or laying tracks in the highways is, as has been said above, in the nature of a contract between the parties, and if it contains proper stipulations giving the municipal authorities the right to revoke it in case of non-compliance with its terms by the electric company, the fact of such non-compliance will give the municipal authorities the right to revoke it, and even if the franchise does not contain such stipulations as to revocation, yet in case of a breach by the electric company of the essential terms and agreements of the franchise, it may be declared forfeited by

[1] Citizens' Street Railway Co. *v.* City Railway Co., 56 Fed. Rep. 746; St. Louis *v.* Western Union Telegraph Co., 63 Fed. Rep. 68; Western Paving & Supply Co. *v.* Citizens' Street Railroad Co., 128 Ind. 525; State, Hudson Telephone Co. *v.* Jersey City, 49 N. J. L. 303; Rutland Electric Light Co. *v.* Marble City El. Light Co., 65 Vt. 377; Citizens' Street Railway Co. *v.* Memphis, 53 Fed. Rep. 715; New Orleans *v.* Great South. Telephone & Telegraph Co., 40 La. An. 41; Fidelity Trust & Safety Vault Co. *v.* Mobile St. Ry. Co., 53 Fed. Rep. 687; Hannibal *v.* Missouri & Kansas Telephone Co., 31 Mo. App. 23; Brooklyn Central Railroad Co. *v.* Brooklyn City Railroad Co., 32 Barb. 358; People's Passenger Railway Co. *v.* Baldwin, 37 Leg. Int. 424; Detroit *v.* Detroit City Railway Co., 56 Fed. Rep. 874.

[2] See statutes, *supra*, §§ 61, 62, 63.

a court of competent jurisdiction. The distinction between the two cases is that if the franchise itself provides for forfeiture on breach of certain of its stipulations, there is no necessity for judicial determination that the breach warrants a forfeiture, whereas if such stipulations as to forfeiture do not exist, there must be a judicial ascertainment that the breach in question is such an essential breach of the stipulations of the contract as to give the municipal authorities the right, as one of the parties thereto, to rescind the same.[1] In any event, the municipal authorities may make an electric light company remove its poles or change their location when this is necessary for the improving of streets according to plans for public improvements made by the proper city officials.[2] This is under the police power of the city.

§ 161. **Location of Poles, when revocable** (*continued*). — Grants of franchise, moreover, are in every case, as has been said, derived originally from the legislature, and when the franchise of allowing poles or tracks in the streets is obtained from municipal authorities, it must be by virtue of some delegation of this authority from the legislature. The method of delegating this authority affects to a great degree the revocability of the franchise granted by the municipal authorities. If the city authorities have no more express delegation of power in this regard than a general power to regulate and control the use of the streets, they may grant a license to a street railway company to lay its tracks and run its cars in the streets; but as this is in the exercise of a legislative function, a succeeding city government may revoke the ordinance granting this right, and this even though the railway company has expended money on the faith of the ordinance, and will be put to great expense and

[1] Belleville *v.* Citizens' St. Ry. Co., 152 Ill. 171; Spokane St. Ry. Co. *v.* Spokane Falls, 46 Fed. Rep. 322.

[2] Monongahela City *v.* Monongahela Electric Light Co., 3 Pa. Dist. Rep. 63.

loss by the revocation of the franchise.[1] When, however, the franchise is granted under an express power given, as it usually is in the statutes, to municipal authorities to designate the streets, and the terms and conditions upon which the tracks shall be laid or poles set, and the cars operated, the effect of the statute together with the consent of the municipal authorities is to vest in the railway company an easement or franchise which is not terminable at the will of the municipal authorities, but is a species of property. It is, however, so far personal to the corporation to which it is granted, that it cannot exist longer than the corporate existence, and if the corporate existence terminates at the end of a certain period, the franchise of allowing tracks and operating cars in the streets fails with the termination of the corporate existence.[2]

§ 162. **Underground Wires.** — Owing to the rapid increase in the number of electric wires strung on city streets and over buildings in order to supply conductors for the various electrical uses of telegraphy, telephony, electric lighting and electric railways, there has been a decided tendency towards the putting of these wires in conduits or subways under the highways. There are various obvious advantages in this method of disposing of all the electrical conductors except those for the overhead trolley system of electric railways, which necessarily must remain strung over the highways. All other wires, however, if properly insulated and arranged in conduits, can, as experience shows, in populous places be more safely and economically managed if laid under the highways than if strung on posts over the streets or across the tops of buildings. The underground system of electric wires is of so recent growth that statutes regulating this matter are only found in a comparatively small number of

[1] Detroit *v.* Detroit City Ry. Co., 56 Fed. Rep. 874. Cf. American Rapid Telegraph Co. *v.* Hess, 125 N. Y. 641.

[2] Detroit *v.* Detroit City Ry. Co., 56 Fed. Rep. 874.

the States, and these statutes may be divided into two classes; first, those which *permit* electric companies thus to lay their wires; and second, those which *compel* them so to do.

§ 163. **Permissive Statutes for Underground Wires.** — In all these statutes the consent of the municipal authorities is required. In Indiana authority is given to the common council of an incorporated city and the board of trustees of an incorporated town to grant to any person or corporation permission to lay their wires underground for the purpose of supplying electric light.[1] Similar power in Kansas is given to the mayor and council of cities of the first class.[2] In Michigan authority is given to telegraph companies to run their wires underground with a suitable or proper covering for the protection of the same.[3] In Massachusetts the wires may be laid under any public way or square.[4] In Mississippi electric light wires may be placed in conduits under the streets by the consent of the municipal authorities.[5] In Missouri telegraph and telephone wires may be placed under any of the public roads, streets, and waters, as well as over, with municipal consent.[6] In New Hampshire all electric wires may be placed beneath the surface of the highways instead of being on poles above them.[7] In New Jersey telegraph and telephone companies are authorized to construct their lines by means of underground cables containing the wires, instead of posts or poles sustaining the wires.[8] In New York electric telegraph companies are authorized to construct and lay lines of electrical conductors underground, with the consent of the common councils of cities, the trustees of villages, or the commissioners of highways of towns.[9] In Ohio telegraph and telephone companies are authorized to construct underground wires and pipes, or conduits for the

[1] Ann. Stat. § 4303.
[2] Gen. Stats. § 555, cl. 23.
[3] How. Ann. Stat. § 3697.
[4] Pub. Stat. 27, § 47.
[5] Ann. Code, § 2933.
[6] Rev. Stats. § 2721.
[7] Pub. Stats. ch. 81, § 1.
[8] Rev. Supp. p. 1023, § 3.
[9] 1 N. Y. Rev. Stat., Birdseye Ed., p. 968, § 1.

lines, in the streets and public ways of a city, with the consent of the city, which shall be given by the Board of City Commissioners, the Board of Public Improvements, the Board of Public Works, or the Board of Administration, or by the city council where no such board exists.[1]

§ 164. **Mandatory Statutes.** — In several States statutes requiring electrical wires to be placed underground have been already enacted. Thus in the District of Columbia it has been made unlawful for the commissioners of the District since Sept 15, 1888, to permit or authorize any additional wire to be erected or maintained on or over any of the streets or avenues of the city of Washington, and the commissioners are directed to report upon the best method of placing the same underground.[2] In Maryland the mayor and council of Baltimore are authorized to provide a series of conduits under the streets, lanes, and alleys for the use of electric wires, and to require all wires and the poles carrying them to be removed from the surface of the streets, lanes, and alleys, and to be placed in the conduits under penalty, and to establish reasonable rental for the use of the conduits.[3] In Massachusetts the mayor of the city of Boston is empowered to appoint a commissioner of wires, who may require all wires, cables, and conductors to be removed or placed underground within certain sections of the city, except long distance telephone wires and railway trolley, guard or span wires, and poles used exclusively for local distribution from underground wires.[4] And thereafter no such poles and wires can be placed in those sections of the city. When companies so place their wires underground they must file a map showing the locations of the wires in the streets. In certain exceptional cases the commissioner may authorize

[1] Laws 1891, p. 296; Laws 1894, p. 205.
[2] Rev. Stats., Supp., ch. 715, cl. 3.
[3] Acts 1892, ch. 200.
[4] Acts 1894, ch. 454, §§ 1, 2, 9.

deviation from the underground system if, in his opinion, it is impracticable in these special instances, and thereupon the company must get a location of poles and wires from the mayor and aldermen.[1] A similar act existed in New Jersey.[2] The effect of the last clause quoted of this act has been considered in a recent case in New Jersey, so far as the possibility is concerned of construing it as authority to the subway commissioners to grant pole rights for overhead wire construction, and it has been denied that the clause has this effect. The real meaning of the section which gives the subway commissioners power to assent to such overhead construction in cases where they deem it advisable is to remove the prohibition of the statute to such construction, and it requires the usual consent of the municipal authorities in addition.[3]

§ 165. **Same Subject** (*continued*). — In New York all electric wires, except electric railway wires, in incorporated cities having a population of five hundred thousand or over, must be placed under the surface of the streets, lanes, and avenues of the city.[4] And the companies owning them are required to remove them from the streets.[5] And a commission of electric subways is appointed to cause the removal of the aforesaid wires from the surface,[6] and to supervise and approve of any plans for underground conduits offered by any companies,[7] and for a taxation of the companies using the subways in proportion to their mileage to pay for the same.[8] In Ohio, in cities where subways have been constructed, it is unlawful to set poles for telegraph or telephone lines within that portion of the city where the subways have been constructed, except for the purpose of distribution to

[1] Acts 1894, ch. 451, §§ 5, 6.
[2] Acts 1892, c. 48; R. 1894, c. 7.
[3] Trustees Presbyterian Church *v.* State Board of Commissioners, 27 Atl. Rep. 809 (N. J.).
[4] 1 N. Y. Rev. Stat., Birdseye Ed., p. 969, § 3.
[5] Ib. § 4.
[6] Ib. §§ 7, 8.
[7] Ib. §§ 9, 10.
[8] Ib. p. 971, §§ 14, 16.

subscribers or stations, and such poles shall be located, so far as possible, in alleys; but existing telegraph companies are to be allowed time to procure the necessary authority and construct subways.[1] In Vermont it is provided that persons desiring to carry telegraph or telephone wires across a highway in a town shall either place them underground or so high above the highway that they will not prove an obstruction to travel.[2]

§ 166. **Constitutionality of Underground Statutes.** — The question whether such statutes are constitutional has been raised in several cases. The strongest objections have been made to them by the telegraph companies, which rely not only upon their right to occupy the streets by virtue of State statutes granting them this right, but also by reason of the federal statutes conferring upon them certain rights of way, which have been before discussed.[3] Perhaps the most important of these cases was one which has been decided in New York in relation to the proceedings of the subway commissioners under the subway acts of 1884, 1885, 1887.[4] This case considers the right of the legislature of New York to order all electric wires in cities of more than a certain number of inhabitants to be placed underground. The plaintiff telegraph company neglected to remove its poles and wires from the streets as ordered by the State authorities in pursuance of the subway acts, and its poles and wires were cut down and removed by the subway commissioners, for which act this suit was brought. The court first considers the question of what rights are granted to telegraph companies by the various statutes of New York giving them the right to erect poles and string wires on the public highways of New York State, and comes to the conclusion that these statutes, being general legislative enactments, do not convey

[1] Laws 1894, p. 205.

[2] Laws 1884, No. 23, § 1.

[3] *Supra*, §§ 38–58.

[4] American Rapid Telegraph Co. *v.* Hess, 125 N. Y. 641.

any precise grant of any right or easement in the public highways, nor constitute any contract which would be violated by the repeal of the statutes, but merely a license to occupy the streets. The court then says that even supposing that a grant of some sort is conferred by these statutes, still the statute requiring the wires to be placed underground is not in contravention of this right, since it is merely a police regulation prescribing the manner in which telegraph companies shall exercise the right granted them, if any, by the statute; that the statute granting the right of way expressly says that telegraph poles shall not be so placed as to obstruct or incommode the use of the highways for public travel; and that although at first the telegraph poles did not so incommode public travelling, being few, and travelling not being so extensive as at present, yet in the course of time, owing to the multiplication of poles and the growth of the use of the streets as highways, the travelling is seriously incommoded by the poles, and therefore the regulation that the wires should be placed underground is proper and constitutional. The same reasoning shows that these statutes are not obnoxious to Section 5263 of the United States Revised Statutes, giving a right of way to telegraph companies over post roads, as has been seen before.[1] The court thus places the right of a State to order the wires underground firmly upon the general police powers of the State, where it unquestionably belongs, and thus allows its operation over the wires of electric lighting companies, telephone companies, and all other electric companies, even though they may have grants of rights of way from the municipal authorities which are in effect contracts between the company and the municipal government, for, as the statutes in question are merely regulations of the mode of enjoying these grants, and depend upon the police power, they are not infringements of the contract, and

[1] *Supra*, § 46.

therefore not liable to the constitutional objections arising therefrom.

§ 167. **Cases on Underground Statutes.** — Several other cases on the effect of these statutes have been decided in New York. An early case was People *v.* Squire.[1] In this case the New York Electric Lines Company applied for *mandamus* to compel the Commissioner of Public Works to give it permission to dig up the streets and lay its wires and cables underground. The company had received from the legislature the authority to obtain franchises for this purpose, and had obtained such franchises from the municipal government of the city of New York, subject to the approval of the Commissioner of Public Works, of plans and locations submitted to him. Subsequently the Act of 1885, which created the Subway Commission, enacted that all companies putting electric wires underground must obtain the consent of the subway commissioners. The Commissioner of Public Works refused to give his consent unless the company had submitted their plans and specifications to the commissioners of the subway. The court held that this was correct; that the statute of 1885, although passed subsequently to the obtaining of the franchise in question, covered all companies without regard to the development of their organization; and that the act was not unconstitutional as a local act, because it covered all cities of a certain class, and all companies wishing to put electric light wires underground in those cities, nor as by implication repealing the subway Act of 1884 without express mention, because it is simply a specification as to the method of carrying out the provisions of the previous act, nor as imposing an unlawful tax on the company for the payment of the Subway Commission's expenses by the companies which were obliged to submit to its rules, this being a just distribution of the expenses, nor as impairing the contract contained in the franchise of the

[1] 107 N. Y. 593.

company, as it is merely a police regulation which overrides all contracts. A later case was United States Illuminating Company *v.* Hess.[1] This was an application by several electric light companies to restrain the Board of Electrical Control from putting their wires underground. The court held that the question of whether or not any specified wires should be put underground was vested entirely in the Board of Electrical Control as a matter of discretion. The plaintiffs contended that this statute was unconstitutional, as depriving them of rights which they had gained under the franchises granted by the city. The court held that it was not unconstitutional, because it was simply a police statute regulating the exercise by the various companies of the rights given them by the city in the interest of the public safety. Plaintiffs, moreover, contended that the action of the board was giving an unjust preference to telephone and electric railroad companies. The court held that even if this were so, it was a matter for *mandamus* as provided by the statute, and not for injunction. In another case[2] quite a number of electric light companies brought suit for an injunction to prevent the Commissioner of Electric Light Wires from tearing down their wires. Under the statutes of 1884–85–87 the subway commissioners and the Board of Electrical Control were authorized to construct subways and compel all electric light and other electrical companies to put their wires underground. As a matter of fact, there were no subways constructed at the time of the acts complained of in which the lines of the electric companies, plaintiffs, could be placed. The Board of Electrical Control had prevented them from repairing the insulation of their wires, and the mayor and Commissioners of Electric Light Wires had begun to tear down their wires as being a menace to public safety from imperfect insulation. The companies

[1] 19 N. Y. St. Rep. 883.

[2] United States Illuminating Co. *v.* Grant, 27 N Y. St. Rep. 767.

contended that they could not be required to put their lines underground until the subways were ready to receive them, and that they should be notified by the mayor of such lines as he considered defective in insulation, and allowed to repair them instead of their being torn down. The court took simply the broad ground that the wires of the plaintiff companies were a nuisance, and dangerous to public safety, and might be abated even by individuals, and that the mayor and Board of Electrical Control had complete authority to tear them down, and were not obliged to notify the maintainers of the nuisance of their intention, nor to point out in what particular portions of the lines the nuisance existed.

Still another case on the same general subject was United Lines Telegraph Company *v.* Grant.[1] This was a bill in equity to restrain the collection of a tax on a telegraph company for its share of the expense of putting the electric wires underground in New York. The company maintained that the statutes of 1884, 1885, and 1886, providing for the putting underground of all electric wires, were unconstitutional, and even if not unconstitutional, the actual proceedings thereunder had so far departed from the authorization of the statute, that they were not protected by those acts. The court dismissed the application on the ground that if the statutes were unconstitutional, the applicants might resist the enforcement of the assessment without becoming liable in any way, as the sheriff and collector of taxes would in such case act entirely without authority.

§ 168. **Exclusive Franchises.** — Since the legislature represents the sovereign power of the State and the right of the public in highways, it may grant exclusive rights of way over the highways for the poles and wires or tracks of any electric companies, subject to two restrictions; first, that such exclusive rights are not in conflict with any provision of the State Constitution prohibiting grants of monopolies

[1] 137 N. Y. 7.

or exclusive rights; and second, that such exclusive grant is not in conflict with any provision of the federal Constitution.[1] It has already been seen,[2] that the Act of Congress giving telegraph companies rights of way over post roads prevents any State legislation which grants exclusive rights of such a nature as to interfere with the rights of telegraph companies under this federal act, and therefore State legislatures may not, either directly by their statutes, or indirectly by the exercise by municipal authorities of the delegated power, grant any exclusive rights which interfere with the enjoyment by telegraph companies of their federal franchise.[3]

§ 169. **Exclusive Grant for Telegraph by Act of Legislature.** — A few attempts have been made by telegraph companies to have incorporated in their charters clauses conferring upon them the exclusive right to do telegraphing business within certain localities. Such grants are held to be inoperative against other telegraph companies who seek to acquire rights of way in the same localities, on account of the Act of Congress, Section 5263, above referred to.[4] A leading case upon this point was Pensacola Telegraph Company *v.* Western Union Telegraph Company.[5] In this case the Pensacola Telegraph Company had inserted in the charter granted to it by the State legislature, a provision giving it the exclusive right to do telegraphing within a certain locality, but the United States Supreme Court held that the telegraph is a means of interstate commerce, and also an agent of the federal government, and on these grounds, as well as on account of the franchise granted by Section 5263 of the United States Revised Statutes, the exclusive grant of

[1] Pensacola Telegraph Co. *v.* Western Union Telegraph Co., 96 U. S. 1; New Orleans Gas Co. *v.* Louisiana Electric Light Co., 115 U. S. 650; Louisville Gas Co. *v.* Citizens' Gas Co., Ib. 683.

[2] *Supra*, §§ 43 and 45.

[3] Pensacola Telegraph Co. *v.* Western Union Telegraph Co., 96 U. S. 1.

[4] See *supra*, §§ 43, 47.

[5] 96 U. S. 1.

the State legislature could not be maintained against another telegraph company seeking to enter the same territory, and which had accepted the provisions of said section of the statutes.

The decisions of the State courts, however, on this subject are not entirely in accord with those of the federal courts. In an early case in California, 1863, an exclusive grant by the State legislature to a telegraph company was held to be valid. In this case the charter provision was "That no person or persons shall be allowed to locate or construct or run any telegraph line or any portion thereof within a half mile of the route selected by the [chartered persons], except that within one half mile of any incorporated city proprietors of any such line of telegraph may enter said city and depart therefrom, making their stations within twenty yards of the station of said chartered persons." Local side lines were also authorized, but lines were not to be constructed nor offices established so as to do business directly or indirectly between the cities aforesaid. The court held that this prohibition against competition by other lines was constitutional, and entitled the telegraph company to an injunction against another line proposing to build within the same territory. It is to be noticed that this decision was rendered before the United States Supreme Court had rendered the decision in the case of the Pensacola Telegraph Company, and in all probability the State courts would now follow the authority of the latter decision.[1]

§ 170. **Exclusive Right of Way for Telegraph over Railways by Contract.** — Telegraph companies have frequently, more especially in the earlier days of the business of the company, entered into contracts with railway companies for the exclusive privilege of running a telegraph line along the right of way of the railroad company. Such contracts sometimes also included an agreement by the railway company not to

[1] California State Telegraph Co. *v.* Alta Telegraph Co., 22 Cal. 398.

haul poles or other supplies over its line for any other telegraph company. These agreements have generally been held void by the courts as against other telegraph companies seeking similar rights, either on the ground that they are in contravention of the rights conferred on telegraph companies by the federal statute, which forms Sections 5263 *et seq.*, of the United States Revised Statutes, or because such an exclusive agreement prevents competition in the important commercial business of telegraphy, and is an agreement in restraint of trade, and therefore void as against public policy, the courts holding that either of these grounds is sufficient to render such exclusive rights granted by the railway company to a particular telegraph company to be inoperative and void. Especially the federal courts maintain that the section of the United States Revised Statutes, above referred to, gives to every telegraph company which accepts its provisions, as required thereby, the right to construct and maintain and operate its line of telegraph over every post road (and all railroads are post roads) without regard to any exclusive rights granted by the railway company to any other telegraph company.[1] In the case of Pacific Postal Telegraph Cable Company *v.* Western Union Telegraph Company, the postal company had such an exclusive contract with the railroad company, and attempted to maintain its exclusive right on the ground that the contract was in reality a grant

[1] Western Union Telegraph Co. *v.* American Union Telegraph Co., 9 Biss. 72; Western Union Telegraph Co. *v.* Burlington & Southwestern Railway Co., 3 McCr. 130; s. c. 11 Fed. Rep. 1; Western Union Telegraph Co. *v.* Baltimore & Ohio Telegraph Co., 19 Fed. Rep. 660; Western Union Telegraph Co. *v.* American Union Telegraph Co., 65 Ga. 160; Western Union Telegraph Co. *v.* Baltimore & Ohio Telegraph Co., 22 Fed. Rep. 133; Western Union Telegraph Co. *v.* Baltimore & Ohio Telegraph Co., 23 Fed. Rep. 12; Baltimore & Ohio Telegraph Co. *v.* Western Union Telegraph Co., 24 Fed. Rep. 319; Pacific Postal Telegraph Cable Co. *v.* Western Union Telegraph Co., 50 Fed. Rep. 493; New Orleans, etc. Railway Co *v.* Southern, etc. Telegraph Co., 53 Ala. 211; Mercantile Trust Co. *v* Atlantic & Pacific R. R. Co., 63 Fed. Rep. 513. See also, *supra*, § 15.

of an interest in the land, and as such could not be encroached upon by the other telegraph company without compensation. The court, however, held that if it was a grant of an interest in land, it was *ultra vires* for the railroad company to make such a grant, as it held its lands under its charter solely for railroad purposes, and that whether the document were considered as a grant or a mere contract, it was void so far as it attempted to confer upon the telegraph company any exclusive right to run its telegraph lines over the railroad company's right of way.

§ 171. **Grant of Monopoly separable.** — Although the grant by a railway company to a telegraph company of the exclusive right to construct a telegraph line over the railroad company's right of way creates a monopoly, and is in restraint of trade, and therefore void as against public policy, yet it does not necessarily follow that the whole agreement between the parties is tainted with the illegality of this monopolistic grant, and if it can be separated from the rest of the contract the other provisions will be upheld by the courts while condemning the grant of the exclusive right of way.[1]

§ 172. **Exclusive Right in Telegraph Company.** — One of the earliest cases in which a claim was put forward by a telegraph company to an exclusive right to do the business of telegraphy within certain specified limits, was a case which came before the Supreme Court of the United States in the early days of the art of telegraphing. The Western Telegraph Company, owning a line of telegraph between two large cities, and having it fitted with certain telegraphing apparatus which had been patented, and which it had the sole right to use, brought a bill in equity against a rival telegraph company which operated a line of telegraph between the same places, but by a circuitous route. It is not clear upon what grounds the plaintiff company sought to

[1] Western Union Telegraph Co. *v.* Burlington & S. W. Ry. Co., 11 Fed. Rep. 1; Smith *v.* Western Union Telegraph Co., Ib.

enjoin its rival, but it seems to be in general that the expenditure of capital and the application of patented apparatus to complete the line between the two places in question, gave the prior company a vested exclusive right for the business between these places. The Supreme Court of the United States at once disposed of this claim.[1]

§ 173. **Exclusive Grants by Municipal Authorities.** — As has been previously seen,[2] the legislature may, and in fact generally does, delegate to the municipal authorities more or less fully the right to grant locations of poles, wires, or tracks for electric companies in the highways, and the question whether a grant of an exclusive right for such a location, made by proper municipal authorities is valid depends upon several considerations. In the first place, if a restriction exists either in the Constitution or the statutes of the State, prohibiting such exclusive grants, they are void.[3] It is outside the scope of this work to consider general constitutional or legislative provisions against the granting of monopolies, but there are express statutory provisions in several States preventing the granting of exclusive rights to telegraph or telephone companies, which will be shortly noticed. These statutes reinforce the provisions of the federal Constitution above discussed.

§ 174. **Arkansas, Kansas, Louisiana.** — In Arkansas no contract is allowed between telegraph and telephone companies and the owners of land or other persons, for the right to erect, operate, or maintain telegraph and telephone lines over the lands to the exclusion of other persons or corporations authorized to erect similar lines.[4] In Kansas the

[1] Western Telegraph Co. *v.* Magnetic Telegraph Co., 21 How. 456; Same *v.* Penniman, 21 How. 460.

[2] *Supra*, §§ 145, 146, and statutes *passim*.

[3] Pensacola Telegraph Co. *v.* Western Union Telegraph Co., 96 U. S. 1; Grand Rapids Electric Light & Power Co. *v.* Grand Rapids E. E. L. & F. G. Co., 33 Fed. Rep. 659.

[4] Acts 1885, Act 107, § 4.

statute provides that no corporation shall have power to contract with any owner of land for the right to erect and maintain a telegraph over his lands to the exclusion of the lines of other companies.[1] In Louisiana a similar provision covers both telegraph and telephone lines.[2]

§ 175. **Missouri, Ohio, Tennessee, Texas, Virginia.** — In Missouri a similar provision extends to both telegraph and telephone lines.[3] In Ohio the statute provides that it is unlawful for any telegraph company and the owner of any right of way to contract for the exclusive use thereof for telegraphic purposes.[4] In Tennessee no telegraph or telephone company can contract with the owner of lands or rights of way, or any other person, for the right to erect and operate telegraph or telephone lines over any lands, privileges or easements, to the exclusion of other persons and corporations authorized to do the same business.[5] In Texas the statute provides that no corporation shall have the power to contract with any owner of land for the right to erect and maintain a telegraph line over his lands to the exclusion of other companies.[6] In Virginia the statute provides that no right of way acquired by a telegraph or telephone company shall be to the exclusion of other like companies from rights of way over the same lands.[7]

§ 176. **Intent to grant Exclusive Privilege not inferred.** — In the absence of such legislative restrictions it is probably true in most States that the legislature may itself grant exclusive franchises except as above stated as to telegraph companies, or it may delegate the power so to grant them to the municipal authorities; but an important rule which is insisted upon by the courts in several cases, is that the power to make an exclusive grant, or the exclusiveness of a

[1] Gen. Stat. § 1385.
[2] Acts 1880, No. 124.
[3] Rev. Stat. § 2723.
[4] Rev. Stat., Smith & Ben. § 3455.
[5] Code, Acts 1885, c. 66, § 4.
[6] Sayles' Annot. Stat., Art. 624.
[7] Code, § 1289.

grant made, will not be inferred or implied. It must be in both instances expressly given by the legislature and by the municipal authorities, for it is a well-settled principle that no implication will be indulged in derogation of the rights of the public in the absence of express or plain terms of grant. An intention to grant an exclusive privilege or monopoly will not be implied, nor will a grant of privileges be given a scope and effect in restriction of public right beyond what the plain words require. This principle applies not only to grants by the State, but to grants of privileges by municipal corporations affecting public rights.[1] In many States also the general policy to prevent monopolies or exclusive rights would allow the courts to hold exclusive grants void.

§ 177. **Exclusive Grant not implied.** — It has been decided that the ordinary grant to a city of the power to cause the streets to be lighted, or similar authority, does not include the power to grant an exclusive right to the use of the streets for this purpose to any electric light company, even if the grant of such an exclusive right will induce the electric light company to enter into a contract for lighting, or even if it is absolutely necessary in order to procure such lighting.[2] In a case in the Circuit Court of the United States it was held that a city which has by its charter the right to cause the streets to be lighted, could not, under the authority conveyed by this charter, make a grant to a gas company of the exclusive right to carry on the gas lighting business in

[1] North Baltimore Passenger Railway Co. *v.* North Avenue Railway Co., 75 Md. 233; State, Green *v.* Trenton, 54 N. J. L. 99; Halsey *v.* Rapid Transit Street Railway Co., 47 N. J. Eq. 390; Omaha Horse Railway Co. *v.* Cable Tramway Co., 30 Fed. Rep. 324; Asheville St. Ry. Co. *v.* West Asheville &c. S. S. St. Ry. Co., 19 S. E. 697; Bridge Co. *v.* Hoboken, 13 N. J. Eq. 81; Delaware & Raritan Canal Co. *v.* Camden & Atlantic Railway Co., 16 N. J. Eq. 371.

[2] Grand Rapids Electric Light & Power Co. *v.* Grand Rapids E. E. L. & F. G. Co., 33 Fed. Rep. 659.

the city, even though this exclusive right were limited as to time.[1] It was further held in this case that a grant in a contract of the exclusive right to lay gas pipes and do a gas-lighting business is not impaired by a subsequent contract between a city and an electric lighting company granting the latter the right to use the streets for the purpose of setting poles and stringing wires to light the city with electricity.[2] In a Michigan case the direct question was raised whether the grant of an exclusive right to an electric company to use the streets for setting poles and stringing wires, was valid against another electric company seeking to use the streets for the same purpose, so that the prior company could get an injunction against the later company and restrain it from the use of the streets for that purpose. Several elements entered into the decision of this question. The first was whether the State Constitution prohibited the grant of monopolies and exclusive privileges. The second question was whether the power to grant such exclusive privileges which lies originally with the people of the State, as represented by the legislature, had been delegated to the municipal authorities. It was held that a city or town has only such powers as are granted it by the legislature; first, by express words; second, by fair implication from the language of the legislature; and third, such as are indispensably necessary to the exercise of powers granted by the legislature. A mere convenience in this last case is not sufficient to authorize such implication. In the case in question the power to cause the streets to be lighted was expressly granted, together with the power to regulate the use of the streets in general, to regulate the placing of lamp-posts, and the power to amend or repeal any city ordinances. The court held, however, that these grants were not sufficient to confer upon the city authorities the right to make an

[1] Saginaw Gas Light Co. *v.* City of Saginaw, 28 Fed. Rep. 529.

[2] Saginaw Gas Light Co. *v.* City of Saginaw, Ib. See also *post*, § 179.

exclusive grant for the use of the streets for the purpose of setting poles and stringing wires for electric light. The court takes the ground that the highways belong to the people, and that the right of a city to use them for its lighting does not give the city any power to exclude the public from them, and that nothing short of a delegation by the State to the city of the whole sovereign power over the streets would give to the city the right to make any such exclusive grant. The fact that such a grant would be an important factor in the business dealings between the city and the electric light company in relation to securing the contract for lighting the streets and public places in the city was held to be not sufficient to change this rule, nor would it, even if the electric company absolutely refused to make such a contract without the exclusive grant.[1]

§ 178. **Exclusive Franchise for Street Railway sustained.** — The grant of an exclusive franchise or right of way along certain streets by municipal authorities has been sustained in the Circuit Court of the United States. In this case a State statute authorized the municipal government to grant franchises or rights of way to street railway companies, and in pursuance of this authority the municipal government granted a franchise which contained a clause to the effect that the city should not "during all the time to which the privileges hereby granted to said company shall extend, grant to or confer upon any person or corporation, any privilege which shall impair or destroy the rights and privileges herein granted to said company." Subsequently the city authorities granted a right of way over the same streets to a second street railway company, and the first one thereupon brought suit in the federal court to enjoin the construction of the second railway, alleging that a grant of a right of way to a street railway company, if accepted and followed

[1] Grand Rapids Electric Light & Power Co. *v.* Grand Rapids E. E. L. & F. G. Co., 33 Fed. Rep. 659.

by construction of the lines, is a contract, and that the action of the municipal authorities in granting the second right of way was an impairment of the obligation of the original contract, in opposition to the Constitution of the United States, which enacts that no State shall pass any law impairing the obligation of contracts.[1] The court sustained this view of the case, holding the first franchise was unquestionably a contract with the first company, and that although the impairment of this contract was directly effected by the act of the municipal authorities, yet since they acted by virtue of legislative authority delegated to them by the legislature of the State by a State law, it was, in effect, brought about by a State law acting indirectly, and therefore was within the provision of the United States Constitution.[2]

§ 179. **Interpretation of Exclusive Rights.** — In a case in Iowa[3] the plaintiff, being a stockholder in the Des Moines Broad Gauge Railway Company, brought a bill in equity to restrain the company from equipping its tracks with electrical apparatus, and operating an electric railway, the reason alleged being that another company, the Des Moines Street Railway Company, a narrow-gauge road, had an exclusive right for horse-car service in the city of Des Moines; and he alleged that it was wasting money for his road to try to meet the objection that the other road had the exclusive right of the streets for street-cars. The court held that the broad-gauge road had only an exclusive right for horse-car service, and this did not interfere with the town granting rights to another company to run an electric road, or any other road except a horse road; and that the agreement in the ordinance granting the narrow-gauge road its exclusive right that the city would not grant any privileges or franchises that would interfere with this right, meant simply interference with a

[1] U. S. Constitution, Art. I., § 10.

[2] Citizens' St. Ry. Co. *v.* City Ry. Co., 56 Fed. Rep. 746.

[3] Teachout *v.* Des Moines, etc., R. Co., 75 Ia. 722.

horse-railroad right, and would not prevent the granting of electric-road franchises.[1] That a grant of right to set poles for electric-lighting is not an infringement of a prior exclusive grant of a gas lighting privilege, was held in a case which went to the Supreme Court of the United States.[2]

§ 180. **Exclusive Rights by Statutes.** — In some States general statutes create limited monopolies in favor of certain classes of companies. Thus in Massachusetts a statute exists whereby it is provided that when an electric light company is engaged in the business of furnishing electric light in a town, no other similar company shall lay or erect wires over or under the streets for the purpose of carrying on the same business without the consent of the mayor and aldermen. Under such a statute the court has held that such evasions by a new company, as selling the customer so much of a wire as crosses the street, will not be allowed, nor even letting the customer put up his own wire across the street, and then using it to furnish electric lighting current upon. The statute is construed to mean not only the prohibition against erecting wires, but also against maintaining or using them.[3] Similarly in Pennsylvania a statute exists giving monopolies to certain kinds of lighting and heating companies, but it has been decided that electric light companies do not come within the provisions of this statute, because it refers to companies supplying light and heat through pipes.[4]

§ 181. **Right to use Electricity for Lighting.** — As was said previously,[5] the power to light the streets and public places

[1] See Des Moines St. Ry. Co. *v.* Des Moines Broad Gauge St. Ry. Co., 73 Ia. 513, s. r.; and *ante*, § 177.

[2] Newport Light Co. *v.* Newport, 151 U. S. 527; Newport *v.* Newport Light Co., 89 Ky. 454, 84 Ky. 166. See also, *ante*, § 177.

[3] Atty.-Gen. *v.* Walworth Light & Power Co., 157 Mass. 86.

[4] Scranton El. Light & Heat Co.'s App., 122 Pa. St. 154.

[5] *Supra*, § 132.

of cities, towns, and other populous localities, is considered to be an inherent power of the municipal authorities, for the purposes of convenience and safety in the use of the highways and public places at night. The right to use electric light for this purpose in cases where no express statutory authority is given, and incidentally to authorize the laying or stringing of electric light wires in the streets, would seem to follow from the principal power to provide lights. This point, so far as it relates to the power of municipalities to acquire and operate their own electric light plants, is discussed fully in the chapter on Municipal Ownership of Electric Light Plants,[1] and it is sufficient to state here that opposing decisions have been rendered in two States as to the power of municipalities to use electric light for lighting streets and public places, when the mode of so doing is by acquiring and operating an electric light plant, in the absence of statutory authority to use electric light. In Massachusetts, where the only statutory power was till recently to erect and maintain street lamps, and to raise money for this purpose, the court held that this power did not carry with it as incidental the power to purchase or construct a costly electric light plant, and to raise money for this purpose by taxation.[2] In this State, however, the common practice of contracting with electric light companies for lighting streets and public places by electricity has prevailed for many years without question of the right of the cities and towns so to do. In Indiana it is held that as the municipalities have an inherent power to light streets and public places, they may, in the absence of statutory provisions, provide that form of light which is best suited to the wants and financial condition of the corporation.[3] The latter decision would support the right of municipalities to

[1] *Post*, §§ 188–197.

[2] Spaulding *v.* Peabody, 153 Mass. 129.

[3] Crawfordsville *v.* Braden, 130 Ind. 149.

use electric light, either by contract or by operation of a municipal plant, without express statutory authority.

§ 182. **Right to use Electricity as Motive Power, Street Railways.** — The right of a street railway company to use electricity as its motive power depends upon two things. First, a sufficient grant from the legislature. Second, a sufficient consent from the municipal authorities. In cases where the grant from the legislature of the right to use electricity is expressed in the statutes, as is the case in many States,[1] and the municipal authorities have granted the requisite consent, no question can arise except whether the grant includes the right to set poles and string wires in the streets as auxiliary to the principal grant.[2]

§ 183. **Right to set Poles and string Wires as incidental.** — A grant of authority to use electricity as the motive power of a street railway carries with it, as accessory to the principal power, an authority also to use the necessary apparatus in the shape of poles and overhead wires for the efficient exercise of the principal power.[3] This is because the only commercially possible form of electric railway at the present day is what is known as the overhead trolley system, which requires such poles and wires. It is by no means sure, however, that the progress of invention may not discover other methods which will enable the street railways to use electricity as motive power without the installation of overhead apparatus, and if this proves to be the fact, it is questionable whether the courts will sustain their present rulings so as to impose the very substantial burden of poles and wires on the streets as a mere auxiliary and inferential power from the grant of the authority to use electricity as motive power. In fact, in a case in New Jersey, the court has already taken

[1] *Supra*, §§ 133–143.

[2] As to the construction of such grants, see *ante*, §§ 146, 153.

[3] Taggart *v.* Newport St. Ry. Co., 16 R. I. 668; Halsey *v.* Rapid Transit St. Ry. Co., 47 N. J. Eq. 390.

the ground that the overhead system is by no means the only successful electric railway system; that the storage battery system which requires no outside apparatus, and the underground conduit system, which requires no poles or overhead structures, are both practical, and that a statute which authorizes the use of electric motors in street railway operation does not inferentially authorize the setting of poles and stringing of wires.[1] No doubt the court in this case was influenced by the narrow language of the statute, which authorized merely the use of "electric motors," but the court takes occasion to criticise the doctrine which allows such large and important structures as the poles and overhead wires of the trolley system to be carried inferentially under a grant of the right to use electric motive power, mentioning the other methods above indicated of using electricity without these auxiliary structures; and further takes occasion to define closely what a street railway should be, that is, that it should be strictly limited to such construction as will not interfere to any great extent with the use of the street by the public, both on foot or in teams, and intimates a tendency towards holding electric railroads to be an additional use of the street for which it was not originally contemplated. It remains to be seen, therefore, whether the courts will not limit their former rulings in regard to overhead structures, and require express authority for the erection of poles and the stringing of wires for this purpose in the public highways in addition to the general grant of the right to use electricity as the motive power.[2]

§ 184. **Inferred Right to use Electricity.** — When there has been no express authority given to a street railway company to use electricity as a motive power, the question arises whether it has sufficiently broad powers either by its charter

[1] State, Greene *v.* Trenton, 54 N. J. L. 92. Cf. State, Halsey *v.* Newark, 54 N. J. L. 102.

[2] See also, *ante*, §§ 107–109.

or by general laws, to use such a means of propulsion.[1] An authorization to use horse or "other power" has been held to include the right to use electric motors.[2] Thus, for instance, in a charter which granted a railway the right to operate its road "with steam, horse, or other power, as the councils of said cities and towns may from time to time direct," the court said, "It seems to me that the provision that the tracks or road shall be operated by 'steam, horse, or other power, as the councils of said cities and towns may from time to time direct,' is broad enough to empower said councils not only to authorize the use of electricity as a motor, but also to authorize its use by means of any system of application which it approves as suitable."[3]

§ 185. **Inferred Right to use Electric Motive Power** (*continued*). — So in a case in Pennsylvania, the question was raised under a public statute which gave passenger railways the right to use other than animal power in cities of the first class when authorized by the councils. Acting under this authority, a traction company began the construction of an electric railway.[4] Several people living on the land abutting on the highway brought a bill in equity to restrain the traction company from the erection of poles and stringing of wires for the electric railway. The charter of the company did not give it the right to operate by electricity, but the Act of May 8, 1876, Public Laws, 147 (at which time the electric railway was not known), gave passenger railways the right to use other than animal power in cities of the

[1] On interpretation, see *ante*, § 153.

[2] Taggart *v.* Newport Street Railway Co., 16 R. I. 668; Buckner *v.* Hart, 52 Fed. Rep. 835.

[3] Taggart *v.* Newport Street Railway Co., 16 R. I. 668. In another case it was held that where a grant was of any motive power or system of traction, this would include a right to use electricity as motive power, especially since at the time the grant was made, which was in 1890, the use of electricity for the propulsion of street railways was well-known. Green *v.* City & Suburban Railway Co., 28 Atl. Rep. 626.

[4] Reeves *v.* Philadelphia Traction Co., 152 Pa. St. 153.

first class, when authorized by the councils. The trial court issued a perpetual injunction restraining defendant company from constructing its electric railway. On appeal, however, the court held that the company had the right to build its electric railway. The case also settled an objection to the constitutionality of the statute giving railway companies this power, *i. e.*, that it was a special act altering, making, and relating to the charter of a private corporation, this being unconstitutional by the law of Pennsylvania. The court, however, says that a statute which applies to all individuals of a class is a general statute, and not a special one, and that a classification of cities is a kind of classification permissible in statutes, and that a statute which applies to one of the powers of all cities of the first class is a general statute.[1] An authorization to use steam power does not, however, include a right to use electricity, though the latter is generated by the power of the steam-engine.[2]

§ 186. **Grant of Right by Municipality only.** — In a later case in Pennsylvania a passenger railway company, incorporated with authority to use only horse power for the operation of its cars, procured from the municipal authorities of the city the right to use electricity as a motive power, and attempted to construct and operate such a railway. Abutters brought a bill in equity to enjoin the construction, and applied for a preliminary injunction on affidavits. The court refused the injunction on the ground that the question whether a passenger railway company, incorporated with authority to use only horse power for the traction of its cars, could be converted into an electric railway company by the action of the municipal authorities of the city in which the line of the company's road might be, was too serious a question to

[1] To the same effect as to classification of cities is Toledo Consolidated Street Railway Co. *v.* Toledo Electric Street Railway Co., 6 Oh. Cir. Ct. Rep. 362.

[2] Prospect Park & Coney I. Ry. Co. *v.* Coney Isl. & Brookl. Ry. Co., 39 N. E. Rep. 17.

be decided on motion. An appeal from this decision was confirmed for the same reason.[1] This case, therefore, does not decide definitely the question in that State.

§ 187. **Right to use any Motive Power.** — If the statutes relating to the organization of street railway companies provide simply that a corporation may be organized for the purpose of operating a street railway, and make no special mention of the motive power which is to be employed, the company may employ any motive power, including electricity.[2]

[1] Fritz *v.* Erie City Passenger Railway Co., 155 Pa. St. 472.
[2] Halsey *v.* Rapid Transit St. Ry. Co., 47 N. J. Eq. 390.

CHAPTER VII.

MUNICIPAL OWNERSHIP OF ELECTRIC LIGHTING PLANTS.

§ 188. Municipal Ownership.
189. Municipal Ownership, Massachusetts Decisions.
190. Municipal Ownership, Implied Power of.
191. Commercial Lighting by towns.
192. Purchase of existing Plant.
§ 193. State Statutes.
194. Interpretation of Massachusetts Statutes.
195. Iowa, Michigan, Mississippi, Nebraska.
196. Ohio, Pennsylvania.
197. Constitutionality of these Acts.

§ 188. **Municipal Ownership.** — The question has been raised in several instances whether or not a city or other municipality has the right without express statutory authority to purchase or construct and operate an electric lighting plant of its own for the purpose of lighting its public streets and highways, and also of engaging in a general commercial lighting business. Many economical reasons exist, in fact, which render it desirable for the cities and towns so to do, rather than to hire the light from a private corporation. Decisions as to whether a city or town has such authority, and if so, to what extent, are not numerous at present, nor are they wholly uniform. On principle it would seem that such power should exist in the municipal authorities, at least so far as lighting the streets and public places is concerned. The power to light the streets and public places is almost necessarily implied as one of the police powers of a municipality, for well-lighted streets are among the most efficient preventives of crime and assistances in the discovery of criminals, as well as most necessary for convenience of public travel.[1] The power to light the streets in some method has been almost uniformly recognized as existing in the municipal authorities from the earliest times. It is

[1] Dillon, Mun. Corp. § 691.

often enumerated or mentioned among the general powers of municipalities in the statutes relating to such corporations, or in their charters, but its omission would not thereby deprive the city of the power, and electricity may be employed as the means of lighting.[1] While this power to provide light for the streets is generally recognized by the courts, yet there has been a difference of opinion as to whether this power draws after it as incidental, the power to construct or purchase the costly plant and apparatus necessary for the production of electric light when a sufficient quality and degree of lighting can be obtained by other less expensive means, and a great increase of taxation thus avoided. In some States, as will be seen, statutes regulate this matter.[2]

§ 189. **Municipal Ownership, Massachusetts Decisions.** — The question was brought up in Massachusetts in the year 1890. In this year a bill being before the legislature authorizing municipalities to purchase or construct electric lighting plants for furnishing light in the public streets and places, and to inhabitants for private use, the legislature requested the opinion of the Supreme Judicial Court upon the question whether the legislature might constitutionally pass such a law conferring on cities and towns the power to manufacture gas or electric light for use in the public streets, and for selling to inhabitants for private use. The Supreme Court answered both branches of this question in the affirmative, including also the power to levy a tax for the purpose of raising money to meet the expenditures necessary for these purposes. The court says that the furnishing of light for the streets and public buildings is a public service, and may in some cases be necessary for the full enjoyment of the public streets and places by the public, and is a means of

[1] Crawfordsville *v.* Braden, 130 Ind. 149; Mauldin *v.* Greenville, 33 S. C. 1; State *v.* Hiawatha, 53 Kan. 477.

[2] *Post*, §§ 193–196.

promoting order and affording protection to persons and property, as well as furthering the common convenience in using the streets; and that as to the supplying of light to the inhabitants for private use, it is a fact that artificial light of some kind is generally used by the inhabitants, and that gas and electricity are forms of artificial light very advantageous in their use for the inhabitants, but so costly that they cannot be commonly used unless they are supplied by private corporations or by the municipality, and therefore a statute giving the municipality the right to furnish such conveniences to its inhabitants is constitutional in the same manner as statutes giving municipalities the power to furnish water, the right being based upon the advancement of the common convenience and welfare of the inhabitants.[1] The court refused to say, however, whether the statutes of this State existing at that time gave to cities and towns the right to buy or construct their electric light plants for these purposes, but shortly after a test case was brought before the court.[2] In this case a petition was brought by some of the inhabitants of the town to restrain the town from investing in an electric light plant and raising the money necessary therefor by taxation. The court held that the right to furnish electric light was not one of the customary rights possessed by towns by virtue of long usage, and must be found, if at all, in some statutory enactment relating to the rights of towns. The court reviewed the statutes bearing on this point, and found only a statute giving towns the right to erect and maintain street lamps, and to raise money for this purpose, and the court held that this power did not carry with it as incidental, the power to purchase or construct a costly electric lighting plant, and to raise the money necessary therefor by taxation, since other methods of lighting the streets were possible and more economical. The court

[1] 150 Mass. 592.

[2] Spaulding *v.* Peabody, 153 Mass. 129.

further showed that the courts had been strict in that State in construing the powers of towns in order to compel the legislature to confer important powers by express statutes, in which case the powers could be regulated and limited as the needs of the case might demand; and that, in fact, the power in cities and towns to construct water-works was always conferred by statute, and similar important powers were similiarly guarded. This decision was made with a view to the passage of a statute by the legislature conferring the power in express terms; and accordingly a statute was passed shortly afterwards which is noticed hereafter, and which granted these powers to the municipalities, and limited and defined the conditions under which the powers were to be exercised.

§ 190. **Municipal Ownership, Implied Power of.** — In other States, however, courts have held that the town may own and operate its electric lighting plant for the reason that the power to light the streets and public places is a necessary power of municipalities for the preservation of peace and order; that it is one of the police powers which is always implied, if not expressed, in the charter powers; and that, the power itself being inherent in the municipality, it is a matter of discretion as to what mode of lighting should be employed, and the city government has full power to choose that one which, under the circumstances, seems the most advantageous, both in efficiency and economy, and that the power to raise money for these purposes is a necessary incident to the power itself.[1] Thus in a case in Indiana, the question was raised and settled without much discussion. The statutes in that State gave the common council of cities and board of trustees of towns the power to light the streets, alleys, and other public places with electric light, or other

[1] Rushville Gas Co. *v.* Rushville, 121 Ind. 212; Crawfordsville *v.* Braden, 130 Ind. 149; State *v.* Hiawatha, 53 Kan. 477; Mauldin *v.* Greenville, 33 S. C. 1.

form of light, and to contract with any individual or corporation for lighting such streets and public places, on such terms and for such time, not exceeding ten years, as might be agreed upon,[1] or to provide for the erection and maintenance of poles and wires for this purpose;[2] and still further, to authorize any person or corporation to erect and maintain in streets, etc., the necessary poles and appliances for the purpose of supplying electric or other light to the inhabitants.[3] The court held that these provisions, in connection with the broad general powers given in the general corporation acts relating to cities in that State in relation to the public welfare, left no question that the city had a right to buy and operate its own electric-light plant, and incidental to this, that the city might issue bonds to pay for the plant so purchased.[4]

This case was followed by another in the same State, in which the court further decided that the statutes above cited included the power to sell electricity to individuals and private corporations for private use, that is, to engage in a commercial lighting business. The court places the whole power, both as to public and private lighting, upon the police powers of the city, including the power to enact and enforce reasonable by-laws and ordinances for the protection of health, life, and property. The court expresses the principle on which the whole matter rests as follows: —

"So far as lighting streets, alleys, and public places of a municipal corporation is concerned, we think that, independently of any statutory power, the municipal authorities have inherent power to provide for lighting them. If so, unless their discretion is controlled by some express statutory restriction, they may, in their discretion, provide that

[1] Ell. Supp. § 794. [2] Ib. § 795.
[3] Ib. § 796.
[4] Rushville Gas Co. *v.* Rushville, 121 Ind. 212.

form of light which is best suited to the wants and the financial condition of the corporation."[1]

The court further says that the municipal authorities thus possessing the power to light the streets, the power to furnish or procure electricity is carried with the principal power as an auxiliary. The court dissents from the reasoning of Spaulding *v.* Peabody.[2]

In a recent case in Kansas the statute gave the common council of cities authority to provide for and regulate the lighting of streets and the erection of lamp-posts, and to make contracts with any person, company, or association for such purposes, and to give such person, company, or association the privilege of furnishing light for the streets, lanes, and alleys of the city for any length of time not exceeding twenty-one years. The court discussed the question of what construction should be placed upon powers thus conferred by statute, and held that to say that it only allowed the city to contract with other parties for the lighting, is too strict and narrow a construction; that it should be a fair and reasonable construction, and the word "provide," as used in the statute, fairly includes purchasing as well as contracting for. In this case the city was intending to use its lighting plant only for public lighting.[3]

In a somewhat recent case the point was expressly decided that a city had this implied right, even though there was no

[1] And a taxpayer cannot restrain the introduction of electric light merely because the contract therefor is a poor one for the city or the price excessive, in the absence of fraud. Talcott *v.* Buffalo, 125 N. Y. 280.

[2] Crawfordsville *v.* Braden, 130 Ind. 149. A municipality which has the power to acquire and operate its own electric lighting plant, may contract for necessary labor for this purpose without special authority. For instance, may employ linemen to construct and repair the lines. Rockebrandt *v.* Madison, 36 N. E. Rep. 444.

[3] State *v.* Hiawatha, 53 Kan. 477. The court cites the cases of Crawfordsville *v.* Braden, 130 Ind. 149; Hamilton Gas Light & Coke Co. *v.* Hamilton, 37 Fed. Rep. 832; s. c. 146 U. S. 258; State *v.* Hamilton, 47 Oh. St. 52, and Ketchum *v.* Buffalo, 14 N. Y. 356.

express statutory authority given it to light the streets. The only statutory authority given to the municipality in this case was to own property. The court, however, held that the municipality had an implied right to light the streets and public places as one of the necessities of corporate existence, and that this implied power to light the streets carried with it an implied power to purchase such apparatus as might be necessary for furnishing the most satisfactory light. The court, however, held that in this case the city had no right to furnish such light to the inhabitants for commercial lighting, as this was engaging in a commercial business which the city was not authorized to do.[1]

§ 191. **Commercial Lighting by Towns.** — Whether in the absence of statutory authority a municipal corporation which has an electric lighting plant for the purpose of lighting public streets and places, can furnish electricity for the inhabitants for private lighting, does not seem to be fully settled.

In the case referred to in the preceding section,[2] it was held that the city could not engage in a commercial lighting business. In this case the court was obliged to imply the power to do the public street lighting, as no statutory provision existed giving the city even the authority to do this.

In cases where the statutes expressly authorize cities to erect electric lighting plants without distinction as to the use to which they should be put, it has been held that the city, having such a plant in existence, might supply both public and private demands.[3] The analogy of water and gas works is very close, and probably in all cases where the city is authorized by statute to construct and maintain and operate an electric lighting plant, it would be held authorized

[1] Mauldin *v.* Greenville, 33 S. C. 1. [2] Ibid.

[3] Thompson-Houston Electric Co. *v.* Newton, 42 Fed. Rep. 723; Crawfordsville *v.* Braden, 130 Ind. 149.

to supply both public and private demands.[1] But where the power to purchase the electric lighting plant is merely implied from the power of a municipality to light the streets, the courts would not allow it to extend this implied power further than the strict limits of municipal use.[2]

§ 192. **Purchase of existing Plant.** — It is evident that if a municipality within whose limits a private corporation is already maintaining and operating an electric lighting plant, determines to obtain and operate an electric lighting plant of its own for furnishing light on the public highways, and to the citizens, a damage is done to the business of the existing private corporation. It is, however, a damage without an injury, that is, a damage for which no legal redress can be had unless there is something in the charter or franchises or lighting contracts which the private corporation has which renders such action of the municipality a breach of contract. For instance, if an electric lighting company exists in a town, and has been granted by the town certain rights to set its poles and string its wires over the streets, yet if this right is not exclusive in terms, the city violates no contract or duty towards the electric lighting company by purchasing its own electric lighting plant and engaging in the electric lighting business.[3] To avoid, however, the practical injustice of such a course, the statutes which authorize municipalities to engage in the electric lighting business generally provide in some way or other for the purchase by the municipality of any existing electric light plant at prices fixed by commissioners in case of disagreement.[4]

§ 193. **State Statutes.** — In Connecticut, Iowa, Massachusetts, Michigan, Mississippi, Nebraska, Ohio, and Pennsylvania statutes have been passed regulating the subject of the

[1] Thompson-Houston Elec. Co. *v.* Newton, *supra;* Crawfordsville *v* Braden, *supra.*

[2] Mauldin *v.* Greenville, *supra.*

[3] Thompson-Houston Electric Co. *v.* Newton, 42 Fed. Rep. 723.

[4] See statutes, *infra.*

acquisition and operation of electric light plants by municipalities. A most carefully drawn act is that which is enacted in Massachusetts and substantially in Connecticut, and an abstract of which is given below in the note.[1]

§ 194. **Interpretation of Massachusetts Statute.** — Under the Massachusetts statute it has been decided that a vote duly adopted by a city or town, that it is expedient to exercise the authority conferred by the statute, is a sufficient vote under the statute, and need not be in express terms a vote to establish an electric plant in the town.[2] Furthermore, that if it is shown that some of the poles of the existing electric light plant are placed in the street without proper license from the municipal authorities, still this does not prevent the electric light company from requiring the town to purchase its plant, for the poles in question may be left out of the property purchased; and further, that a filing of the schedule, as required by law, having been made by authority of the directors of the company within the time limited, and approved by the stockholders after the expira-

[1] Mass. Acts 1891, c. 370; Acts of 1893, c. 454, Acts 1892, c. 259; Conn. Stats. 1893, c. 231. An abstract of the original act as passed in Massachusetts and its amendments, is as follows. Act 1891, c. 370, § 1. Authority to establish and maintain an electric light plant. § 2. The votes necessary therefor in cities. § 3. The votes necessary in towns. § 4. Authorizing bonds to pay for plant. § 5. Enlargement of plant. § 6. Assessment for cost. § 7. Supply to customers. § 8. Appointment of manager of electric light. § 9. Accounts of his plant. § 10. Prices. § 11. Ordinances regulating operation. § 12. (amended by Act 1893, c. 454, § 5.) Purchase of existing plant. § 13. Same. § 14. Appeal to court. § 15. Determination of corporate franchises. § 16. Liability for accidents. § 17. Application of General Laws. § 18. Revocation of existing franchises. Act 1893, c. 454. § 1. Poles and lines in adjoining town. § 2. Supply of electricity to adjoining town. § 3. Action of company desiring to sell. § 4. Action of city as to adjoining town. § 6. Franchise to continue. § 7. Votes necessary in city. § 8. Purchase of electricity from town. § 9. Issuing notes or scrip. § 10. Institution of municipal light loans. See also, Acts 1894, cc. 182, 432, 448, 533.

[2] Hudson Electric Light Co. *v.* Hudson, 40 N. E. Rep. 109; Citizens' Gas Light Co. *v.* Wakefield, 161 Mass. 432.

tion of the time limited, was sufficient, for the ratification takes effect as of the date of the act ratified.[1] The passage of the two votes by the town fixes the right of the electric light company to sell, and the town cannot afterwards rescind these votes.[2]

§ 195. **Iowa, Michigan, Mississippi, Nebraska.** — In Iowa the statutes give any incorporate city or town the power to establish and maintain electric lighting plants, if approved by a majority of the voters at a general or special election,[3] and for this purpose, to issue bonds running not more than twenty years, with interest not higher than six per cent, provided that the total amount of indebtedness for all purposes in cities shall not exceed five per cent of the assessed valuation, as provided by the Constitution,[4] and this question must be submitted to a vote of the city or town upon the petition of twenty-five property owners in each ward.[5] In Michigan any city or incorporated village may acquire or construct works for supplying electric light.[6] If the common council or board of trustees resolve that it is expedient to exercise this power, they may take such action as they deem expedient, subject to the acts relating to the establishment of water-works, provided, however, that they first submit the question to vote of the electors of the city or village, and obtain a majority vote.[7] One hundred or more of the qualified electors may, by petition to the common council or board of trustees, require them to submit the question to the electors.[8]

[1] Citizens' Gas Light Co. *v.* Wakefield, 161 Mass. 432.

[2] Hudson Electric Light Co. *v.* Hudson, 40 N. E. Rep. 109.

[3] Ann. Code, § 639. [4] Ib., § 645.

[5] Ib., § 646. In this State it is held that it is illegal for the city authorities to grant a franchise or location of poles in the highways even for the lines of a private corporation to supply light to the city, unless this franchise has first been submitted to a vote of the electors of the municipality in the same way as when the city intends to build or purchase its own electric lighting plant. Hanson *v.* Hunter, 48 N. W. 1005; Same *v.* Same, 53 N. W. 81; Keokuk *v.* Fort Wayne Electric Co., 57 N. W. 689.

[6] Pub. Acts 1891, No. 186, § 1. [7] Ib., § 2.

[8] Ib., § 3.

And in cities or incorporated villages of not more than eight thousand inhabitants, the municipalities may furnish commercial lights to the inhabitants.[1] In Mississippi the mayor and aldermen for the installation of electric plants may issue bonds or other obligations, not exceeding in amount, including all outstanding bonds, seven per cent of the assessed valuation of the taxable property in the municipalities, unless authorized by two-thirds of the qualified electors; but in no case shall the amount issued exceed ten per cent of the assessed value.[2] In Nebraska cities of the second class may establish electric lighting systems, and may levy a tax not exceeding five mills on the dollar in any one year for this purpose.[3] And if this tax will be insufficient, the city may issue bonds not exceeding seven per cent interest, and maturing in twenty years, and payable after ten at the option of the city, such bonds not to exceed two and one-half per cent of the taxable value of the property in the city, and no bonds to be issued until this question has been submitted to the electors with proper notice, and received a majority vote in favor; and no election for this purpose shall be called until a petition, signed by at least ten resident freeholders from each ward of the city, is presented to the mayor and council asking an election for that purpose. The city may levy an annual tax of not exceeding two mills on the dollar for operating expenses.[4] The construction of such a plant must be let out to the lowest bidder.[5] The city council may establish rates by ordinance.[6]

§ 196. **Ohio, Pennsylvania.** — In Ohio several statutory provisions exist covering villages of different numbers of inhabitants. The principal features of these acts are the authorization of an issue of bonds for the purpose of building

[1] Acts 1893, No. 139, § 1.
[2] Miss. Ann. Code, § 3014.
[3] Comp. Stat., ch. 14, Art. 1, § 138.
[4] Ib. § 139.
[5] Ib. § 140.
[6] Ib. § 142.

or buying an electric plant, and the power to levy a tax for the purpose of paying interest and establishing a sinking fund to meet the bonds at maturity, and the necessity of a vote of a majority or some higher number of electors to authorize the bond issue.[1] In Pennsylvania incorporated boroughs have the right to manufacture electricity for commercial purposes, and may regulate the price of the same; but if there is an existing electric light company already furnishing electric light, the borough must endeavor to purchase the works of this company at such price as may be agreed upon by the councils of the borough and a majority of the stockholders of the corporation. In case of failure to agree, a petition may be presented to the Court of Common Pleas for the appointment of appraisers for the purpose of taking the property.[2] But before any debt shall be incurred for these purposes, the question of the right to increase the debt of said boroughs for these purposes must first be submitted to the qualified voters of the boroughs in the same manner as is otherwise provided for the increase of indebtedness.[3] Power is given to the city councils of cities of the fourth, fifth, sixth, and seventh classes to purchase for such price as may be agreed upon by the council and a majority of the stockholders of the company, all the real, personal, and mixed estate of any electric light company, and the city may thereupon furnish electric light and own all the franchises of the company.[4]

§ 197. **Constitutionality of these Acts.** — The question of the constitutionality of acts of the legislature empowering municipalities to purchase or construct and operate their own electric lighting systems, both for public street lighting and for furnishing light to the inhabitants for private use,

[1] Laws 1890, p. 61, §§ 1–4; Laws 1890, p. 255, §§ 3–7; p. 373, § 1; p. 271, §§ 1–7; Laws 1891, p. 344, § 1; Laws 1892, p. 184, § 1; p. 185, §§ 1–5.

[2] Laws 1891, No. 65, § 1. [3] Ib. § 2.

[4] Bright. Purd. Dig., Suppl., p. 2321, § 398.

or for public street lighting alone, has been raised and settled in the affirmative in two States. The question was brought up in Massachusetts, as has been shown above, in a question propounded by the legislature, before whom such a bill was pending, to the justices of the Supreme Court, and was answered by them in the affirmative in both branches, placing the right to light the public streets upon the police powers of the municipal authorities, and their right to care for and regulate the use of public streets, and placing the furnishing of light to individuals for private use upon the great advantage and convenience to the inhabitants of the municipality in the use of this form of light.[1]

In Pennsylvania the same question was brought up in court by a bill in equity brought by a number of tax-payers of a borough to prevent the borough from making an addition to an electric lighting plant it had previously built and was then operating, the addition being for the purpose of supplying lights for private use, the former plant having been used simply for public street lighting. The borough proposed to issue bonds to pay for this additional machinery. The plaintiffs rested their case upon two grounds; first, that the statute of Pennsylvania giving municipalities the right to engage in commercial lighting was unconstitutional as allowing boroughs to enter into a private business; and second, that the cost of the proposed plant would raise the total indebtedness of the borough above its limit of seven per cent of the total valuation. The facts showed that the second ground was untenable, and the court disposed of the first ground quite briefly, saying that the furnishing of electric light was a service very much in the nature of the water and gas services, and that as electricity was rapidly coming into use for lighting purposes, the municipalities should keep abreast of the age, and that the public advantage and convenience was sufficient warrant for the constitutionality of

[1] Opinion of the Justices, 150 Mass. 592.

the statute.[1] But in issuing bonds to pay for such plant, the town must keep within the limits of the statute, and follow its provisions, or the issue will be void.[2] An objection was made to the constitutionality of the Massachusetts Act in one case, because it did not provide for the ascertainment by a jury of the valuation of the property of the electric light company, taken, as required by the bill of rights of that State, but the court held that this objection was invalid, as the act did not compel an existing electric light company to surrender its plant to the town, but simply gave it an opportunity to voluntarily sell the same in a certain manner if it wished to do so.[3]

[1] Linn *v.* Chambersburg Borough, 160 Pa. St. 511.
[2] State *v.* Columbia, 111 Mo. 365.
[3] Citizens' Gas Light Co. *v.* Wakefield, 161 Mass. 432.

BOOK II.

CONSTRUCTION AND MAINTENANCE.

CHAPTER VIII.

CONSTRUCTION AS AFFECTED BY FRANCHISE.

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§ 198. **Conditions Precedent.** — In a few States, by statute, conditions precedent to the construction of telegraph lines are imposed. Thus in Colorado any company formed for the purpose of constructing a telegraph line must begin work within ninety days from the date of their certificate on such telegraph lines as shall be named in the certificate, and must

prosecute the work with due diligence until the same is completed, and the time of the completion of any such telegraph line shall not be extended beyond a period of two years from the time the work was commenced as aforesaid.[1] In Massachusetts a telegraph company shall not commence the construction of its line until three-fourths of its capital stock has been unconditionally subscribed for, and at least one-half has been paid in in cash; and the directors shall, within ten days of commencing said line, file in the office of the secretary of the Commonwealth a sworn statement of such subscription and payment.[2] In several States, provisions exist which require the payment of a certain amount of capital before incorporation can be obtained. These *a fortiori* require the payment of the capital before construction.[3]

§ 199. **Construction as affected by Franchise.** — The construction of the lines of telegraph companies upon the highways must conform to the franchise under which this construction is authorized. It has already been seen in the chapters on Franchises, that the right of way which is granted to telegraph, telephone, electric light, and electric railway poles is subordinate to the uses of the highway for public travel, and that the poles must therefore be so placed as not to incommode the use of the highway for the purpose for which it was originally designed, *i. e.*, the travel of the public. A slight obstruction or limitation of travel is, of course, necessary wherever a pole is placed in a highway, for a certain small portion of the street is thereby excluded from use by the public, but this is not an obstruction of travel in the meaning of the franchise statutes;[4] but the poles must be so placed as not to substantially interfere with the use of the highway for travel by the public.[5]

[1] Ann. Stat. § 573.
[2] Acts 1893, ch. 274.
[3] *Supra*, § 33.
[4] Gay *v.* Mutual Union Telegraph Co., 12 Mo. App. 490.
[5] See *supra*, §§ 61, 111–113.

§ 200. **Liabilities to Travellers.** — Therefore if a traveller is injured by reason of a pole being so placed as to incommode travel, or, in other words, so placed as to be a nuisance in the street, *e. g.*, if he is driving and his horse runs against the pole, which is placed in a dangerous position, he may recover damages for such injury against the company so placing the pole, even though it was done by the consent and permission of the municipal authorities, for their power is limited to consenting to the erection of poles in the highway which do not incommode public travel, and the question of whether or not the pole is so placed is for the jury.[1] In the New York case cited the town of Geneva brought suit against the Brush Electric Light Company to recover money which the town had paid on a judgment to a traveller on the highway who had been injured by his horse running away and colliding with a pole of the electric light company which was set in the street. In the trial of the suit by the injured party against the town, it was found that the pole was a nuisance. In the suit, however, by the town against the Brush Electric Light Company, the court held that as the pole had been originally set by permission of the town, and in accordance with a written contract between the town and the lighting company, in which the town reserved to itself the right to designate the place where the poles should be set, and had, in fact, designated the place where this particular pole was set, the town was a joint *tort feasor* with the electric light company, and therefore could not recover from it any of the damages which it had paid to the injured party.[2]

§ 201. **Liability to Travellers, Town.** — It would seem from the above case that a traveller can recover in such a case not only against the electric company, but also against the

[1] Sheffield *v.* Central Union Telephone Co., 36 Fed. Rep. 161; Wolfe *v.* Erie Telegraph & Telephone Co., 33 Fed. Rep. 320; Geneva *v.* Brush Electric Light Co., 50 Hun (N. Y.), 581.

[2] As to poles of electric railways set too near the track and thus causing accidents to passengers, see *post*, § 730.

town which allows a pole thus dangerously placed to remain in the highways, because of the general liability of a town for defects in its highways.[1] In a case in Massachusetts, however, it has been held that no recovery can be had against the town or the electric company in such a case, since the designation of the location of the pole in the highway by the town under authority of the statute is conclusive that the pole is properly placed, and is no nuisance, and the question of nuisance cannot even go to the jury.[2]

§ 202. **Poles set without Authority a Nuisance; English Cases.** — Electric companies cannot set poles in the highways without grants of franchises for this purpose, and therefore a pole set in the highway without such due authority of law is a nuisance which may be abated by proper proceedings of the public prosecuting officer. Thus in an English case, where a telegraph company set its posts in the highway by permission of the local authorities who were the immediate guardians of the highway, but these guardians had no legal authority by Act of Parliament to give this permission, and an indictment was brought against the telegraph company for maintaining a nuisance, Martin, Baron, in the Exchequer, charged the jury as follows: —

"In case of an ordinary highway, although it may be of a varying and unequal width, running between fences, one on each side, the right of passage or way, *primâ facie*, and unless there be evidence to the contrary, extends to the whole space between the fences, and the public are entitled to the use of the width of it as a highway, and are not to be confined to the part which may be metalled or kept in repair for the more convenient use of carriages or foot-passengers.

[1] Geneva *v.* Brush Electric Light Co., *supra.*

[2] Young *v.* Yarmouth, 9 Gray, 386; Commonwealth *v.* Boston, 97 Mass. 558. Similarly it has been said that the city would not be responsible in damages to a traveller who might be injured by his horse slipping on a street railway track lawfully placed in the street. Lawrence *v.* New Bedford, 160 Mass. 227.

"Second, a permanent obstruction erected in a highway, and placed there without lawful authority, which renders the way less commodious than before to the public, is an unlawful act and a nuisance at the common law, and if the jury believes that the defendants placed, for the purpose of profit to themselves, posts, with the object and intention of keeping them permanently there, in order to make a telegraphic communication between distant places, and did permanently keep them there, and the posts were of such size, dimensions, and solidity as to obstruct and prevent the passage of carriages and horses or foot passengers upon the part of the road where they stood, the jury ought to find the defendants guilty in their verdict; and that the circumstances that the posts were not placed on the hard or metalled part of the highway or upon a foot-path artificially formed on it, or that the jury may think that sufficient space for public traffic remained, are immaterial circumstances as regards the legal right of the crown to the verdict."

These instructions were discussed at length by the judges of the Queen's Bench, and were held to be correct, as expressing the legal status of a telegraph pole in a highway placed there without legal authority.[1]

§ 203. **Removal by Town, Doubtful Franchise.** — If the town authorities seek to remove poles or tracks from the street, claiming that they were illegally placed there, or that the franchise has expired, the electric company cannot have a preliminary injunction to prevent such removal, if the question whether or not the poles are legally placed there is doubtful, for the court of equity will not grant a preliminary injunction when the legality of the complainant's right is doubtful.[2] Thus in a case in New Jersey the statute giving

[1] Regina *v.* United Kingdom Electric Telegraph Co., 9 Cox C. C. 174. Cf. Atty.-Gen. *v.* United Kingdom Electric Telegraph Co., 30 Beav. 287; Commonwealth *v.* Boston, 97 Mass. 558.

[2] Athens, Sayre & Waverly Electric St. Ry. Co. *v.* Sayreboro, 156 Pa. St. 23; Mutual Union Telegraph Co. *v.* Chicago, 16 F. R. 309. Cf. *post*, § 232.

the telegraph company the right to set its poles in public ways, expressly provided that in any incorporated city or town no poles shall be set in any street without first obtaining from such city or town a designation of the streets in which they shall be placed, the manner of placing them, etc. The telephone company obtained from the County Road Board the right to set its poles in the streets of East Orange, which, although not strictly an incorporated town, had been granted by the legislature several powers in excess of the ordinary rural township; among these being the power to enact ordinances to prevent or regulate the erection or maintenance of posts, in or upon any street or highway or public place, and to remove such posts if already erected there. The telephone company did not obtain from the East Orange authorities any designation of location for their poles, claiming that the place was not an incorporated town. The town had passed ordinances previous to the setting of these poles, prohibiting the setting of any telegraph, telephone, or electric light poles in the streets without the consent of the street committee. The town authorities therefore attempted to remove the poles, and the telephone company sought to enjoin them. The court, however, held that the telephone company's claim was doubtful, and therefore a preliminary injunction would not be granted, but the parties left to the decision on the final hearing.[1]

[1] New York & New Jersey Telephone Co. *v.* East Orange (inhabitants of), 42 N. J. Eq. 490. The question whether East Orange was such an incorporated town was further considered in a writ of *certiorari* to test the legality of the appointment of commissioners to appraise damages for setting the poles. The landowner claimed that the appointment was illegal since the telephone company had not obtained from the town authorities the designation required by the statute. The telephone company, on the other hand, claimed that the place was not an incorporated town under the statute. The court held that the real meaning of the statute was to give the town authorities the right to designate the location wherever the highways were streets, and not county roads, and if the legislative body of the municipality had been invested with the legal

§ 204. **Liability to Abutting Landowner under Franchise.** — If the pole is set in accordance with proper legislative and municipal consent, it is not a nuisance which the Commonwealth can abate, and *a fortiori* it is not such as an abutting landowner can complain of.[1] And if a person engaged in setting a pole with due authority is arrested, he may be released on *habeas corpus*.[2] The question whether the authority is sufficient for so setting the pole draws in the discussion of the right to set poles in the street without compensation to the adjoining landowner, which has been previously discussed.[3]

§ 205. **Special Injury to Landowner by Construction.** — If, however, the construction of an electric line in a highway inflicts upon an abutting landowner special injury, in the way of damaging access to his premises, or his right to light and air, or other proprietary rights, the company which inflicts this injury is responsible to him in damages, even though it has due legal authority to do what it does, and acts strictly in accordance with this authority.[4] This rule is closely connected with the rule compelling such companies to compensate the landowner for the damages done by the

control of the streets; and therefore that, as East Orange is a large municipality, its highways are streets and not county roads, and its township committee has full power to prevent and regulate the erection or maintenance of anything in the streets that might interfere with public travel, the statute applied to it, and the telephone company must obtain such a location from the township committee. Broome *v.* New York & New Jersey Telephone Co., 49 N. J. L. 624. This question was finally rendered immaterial by the law of 1887, which settles the manner of gaining locations in every instance. New York & New Jersey Telephone Co. *v.* State, Broome, 50 N. J. L. 432.

[1] Gay *v.* Mutual Union Telegraph Co., 12 Mo. App. 490; Irwin *v.* Great Southern Telephone Co., 37 La. An. 63.

[2] Conway, *ex parte*, 48 Fed. Rep. 77.

[3] *Supra*, §§ 104–128. Cf. Potter *v.* Saginaw Union Street Railway Co., 83 Mich. 285; Barber *v.* Saginaw Union Street Railway Co., 83 Mich. 299.

[4] Limburger *v.* San Antonio Rapid Transit Street Railway Co., 27 S. W. Rep. 198; Lincoln Street Railway Co. *v.* Adams, 60 N. W. Rep. 83; Gay *v.* Mutual Union Telegraph Co., 12 Mo. Ap. 490.

taking of his property, which has already been discussed.[1] Abutting landowners who wish to stop the construction of an electric line must not delay to do so, for if their case depends entirely upon damages to their premises, and not upon any inherent illegality in the proceedings of the railway company, the court will consider them estopped by laches if they do not begin their proceedings until after the railway line is wholly or substantially constructed.[2]

§ 206. **Injury to Real Estate by building Electric Railway.** — It has been once held that even though a street railway is authorized by the proper authorities, and is built in accordance with this authority, it may inflict such injury upon adjacent real estate as to render the railway company liable for damages. For instance, where a person owning a store upon a principal street of a town complained that a street railway company, by putting its tracks in the street, had so obstructed the streets and endangered the lives and safety of travellers by running a great number of cars, that trade had forsaken that street and his shop, it was held that he could recover damages for this injury.[3] So where an electric railway company, being duly authorized to construct its tracks upon a street, dug down a distance of twenty-seven feet in the street in order to lay the tracks upon the official grade of the street, and this excavation extended laterally to within ten feet of the plaintiff's land, it was held that his right of access to his land was substantially destroyed, and he might recover damages therefor.[4]

§ 207. **Diverting Water on to Abutting Lands.** — A street

[1] *Supra*, §§ 114, 115, 117, 123–126.

[2] State *v.* Board of Public Works, 29 Atl. Rep. 149. Cf. Chaffee *v.* Telephone & Teleg. Const. Co., 77 Mich. 625.

[3] Limburger *v.* San Antonio Rapid Transit Street Ry. Co., 27 S. W. Rep. 198; reversed, 30 S. W. Rep. 533.

[4] Eachus *v.* Los Angeles Consolidated Electric Railway Co., 37 Pac. Rep. 751. See also White *v.* Northwest North Carolina Railroad Co., 113 N. C. 610, and *ante*, §§ 107–109.

railway company is generally restricted in the construction of its track to the grade of the street as settled by the municipal authorities. If, however, this restriction does not exist, and the railway company in the course of construction builds its track above or below the level of the street in such a way as to divert surface water upon the lands of abutting landowners in unusual quantities, the street railway company is liable therefor. For instance, in a recent case the highway upon which the road was to be constructed led down a hill and across a steam railroad track. This latter track was built upon a grade three or four feet above the level of the surrounding land. In order to cross this railroad track, the electric railway cut through the hill, and then filled up the centre of the highway in the low ground to a height sufficient to bring its tracks level with the steam railway tracks at the crossing. There was a culvert under the steam railway tracks, which, before the construction of the electric railway, had carried off the water which flowed down the hill upon the surrounding lowland; but there was no culvert under the street railway track, and its embankment restrained the surface water from flowing off from a portion of the land through the railway culvert. The court held that by this construction of the electric railway tracks, the surface water was retained and forced upon the land of the adjoining landowners in unusual quantities, and for this the railway company was responsible.[1]

§ 208. **Removal of Tracks for building Sewer.** — Frequently the building of a sewer interferes with the street railway tracks already existing in the street, and in many cases, the plan of sewer construction is such as to locate the sewer directly under the tracks of the street railway. The question therefore arises whether the street railway company, having a valid franchise from the city for the

[1] Lincoln St. Ry. Co. *v.* Adams, 60 N. W. Rep. 82.

position of its tracks, can be required legally to remove its tracks while the sewer is being built, and replace them at its own expense after the completion of the sewer. This matter would depend upon the wording of the franchise and other factors, particularly the statutes relating to the occupation of the streets by street railways; but it has been held that where the facts showed that the sewer could be as well constructed on one side of the street where it would not interfere with the car tracks, and no reservation of the right to require the railway company to remove its tracks for this purpose was in the franchise, the city could not legally require the railway company so to do, although it had made its plans for the construction of the sewer in that specific place, and had entered into the contract upon that theory, but that the city would be required to change its plans and build the sewer at one side of the street. It also appeared in this case that the cost of removing the railway tracks would be great, and that the change on the plan of construction of the sewer would not be excessive.[1] Ordinarily, however, the police power of the city authorities would be sufficient to require the street railway company to so remove its tracks.

§ 209. **Injury to Trees.** — If an electric company obtains a franchise to set its poles and string its wires along and over a highway which is bordered by shade-trees situated upon the land of private owners, the branches of which overhang the street, and will interfere with the stringing of the wires, it is lawful for the electric company, in the absence of contrary statutory provisions, to cut the limbs of the trees in order to make such openings as may be necessary, but not to do unnecessary damage. Thus it has been held in Louisiana that any unnecessary damage to the trees would give the landowner an action for damages.[2] In this case a telephone

[1] Des Moines City Ry. Co. *v.* Des Moines, 58 N. W. Rep. 906.

[2] Tissot *v.* Great Southern Telephone, etc. Co., 39 La. An. 996.

company cut a hole twenty-five feet in circumference through the limbs and foliage of the trees for the purpose of stringing its wires, and the court held that this was an unnecessary injury to the trees, for which damages could be recovered, and even intimated that the telephone company might have strung its wires upon the other side of the street where there were no trees. Probably this intimation carries the rule too far, and in any event, in those States where the location of the poles is definitely fixed in the grant from the municipal authorities, the company could not be required to change this location in order to avoid injury to shade-trees. It would, however, unquestionably be restricted in cutting through such trees to such injury as was reasonably necessary in order to give its wires passage.[1]

In a case in Tennessee a telephone company, in the process of setting its poles and stringing its wires, entered upon private property and cut the limbs of the trees in order to set the poles. This was done merely as a matter of convenience to the telephone people, and was not necessary for the setting of the poles, and the court held that the landowner could recover damages.[2]

§ 210. **Injury to Trees, Statutes.** — In some States the matter of preventing unnecessary injury to trees in the course of construction is accomplished by statute. Thus in Connecticut electric companies must not injure any tree without the consent of the owner,[3] under a penalty.[4] In Maryland if the wires of a telegraph or telephone line are located or stretched or extended in such a manner as to prevent the owner of timber growing along the line from cutting and felling the same, and he injures the lines in so doing, he is not liable to an action of damages unless the same was done wilfully and

[1] Western Union Telegraph Co. *v.* Satterfield, 34 Ill. App. 386; Gilchrist *v.* Dominion Telegraph Co., 3 Rugs. & Barb. 553.

[2] Memphis Bell Telephone Co. *v.* Hunt, 16 Lea (Tenn.), 456.

[3] Gen. Stats. § 3944. [4] Ib. §§ 1477, 1759, 1760.

intentionally.[1] In Michigan the statute provides that in acquiring a right of way over public lands for a telegraph line, no white or yellow pine trees suitable for timber shall be cut down or injured, and no timber of any kind appropriated from public land, except a sufficient number of posts for erecting the line, in no case more than twenty-five from any forty acre tract.[2] And also such company is forbidden to cut down or injure any tree or shrub on the margin of a highway for shade or ornament.[3]

§ 211. **Same Subject** (*continued*). — In New Hampshire no person or corporation can cut, mutilate, or injure any shade or ornamental tree without the consent of the owner of the land on which it grows, or the adjudication of the selectmen after hearing that the cutting or mutilation is necessary, and payment of the damages occasioned thereby.[4] In Pennsylvania damages for the cutting of any trees planted in the highway or on land adjoining the same are given to the landowner, the same being assessed by the Court of Common Pleas of the county or by three appraisers appointed by it.[5] In Vermont no tree may be cut or injured without the written consent of the adjoining owner or the decision of the selectmen that the same is necessary, and damages paid for the same. Any person violating this statute is fined not less than five dollars nor more than fifty dollars for every tree so cut or injured.[6]

§ 212. **Conflicting Franchises for Use of same Street.** — As has been seen, the various electric companies rely generally upon a use of the highways for their poles and wires.[7] There are, therefore, often in the same highway several different kinds of electric wires. If, as is sometimes the case, the use of one kind interferes with the use of other

[1] Pub. Gen. Laws, Art. 23, § 231.
[2] How. Ann. Stat. § 3686.
[3] Ib. § 3977.
[4] Pub. Stats., ch. 81, § 5.
[5] Laws 1891, No. 168.
[6] Laws 1888, No. 32.
[7] *Supra*, ch. iv.

kinds, there arise difficulties of construction which have been brought into court in quite a number of cases. These various interferences will be considered in the following sections.

§ 213. **Telephone v. Electric Railway.** — With the introduction of electricity as a means of propulsion on street railways, there have arisen in many cases conflicts between the telephone companies and the street railway companies arising from the fact that in single trolley electric railway systems (which constitute the majority of cases at the present day) the strong current of the electric railway, finding its way from the rails of the track into the ground, disturbs the operation of the telephone current, and practically renders the telephones commercially valueless in many cases. This injury to the telephone system is done in one of two ways; either by conduction, which is, when the electric current of the railway actually permeates through the ground and gets upon the wires of the telephone company; or by induction, which is an electrical action whereby the strong current of the street railway, if in proximity to the weak current of the telephone, sets up on the telephone wires a current varying with that which is on the railway wires. In either event the result is buzzing and other noises on the telephone, making the operation thereof impracticable. This difficulty may be remedied in one of three ways. First, by the telephone company adopting what is called the metallic circuit, that is, having a return wire for its current instead of using the earth for a return. Second, by the railway company adopting what is called the double trolley system, wherein two wires are strung over the track, and the current is taken from one of them through a trolley and passed through the motor, and then returned to the other wire through the second trolley. In this way, theoretically, none of the current gets into the ground, and consequently no disturbance is made of the operation of the telephone. The third means of obviating the trouble is what is called the McCluer device, which

is practically a single return wire for a number of telephone circuits. This is cheaper of construction than the metallic circuit for every telephone, but less effective. The courts have been called upon in numerous cases to decide whether the railway company can drive the telephone company out of its occupation of the streets, or, if the trouble can be so remedied as to allow both companies to do business successfully, which of the two companies should make the necessary change in its system. The telephone company has, in most cases, had the prior occupation of the streets with its poles and wires, and has also relied to some extent upon its being a telegraph company. The railway company, while subsequent in time, occupies the streets by virtue of municipal ordinances duly granting it the requisite locations. In almost every instance the courts have held that the telephone company should make the necessary change, because the telephone, as a species of telegraph, uses the highways in subordination to the right of public travel thereon, and the electric railway is a form of this travel.[1]

§ 214. **Hudson River Telephone Company v. Watervliet Turnpike and Railway Company.** — The most important of the earlier cases in which this result was reached was the case of the Hudson River Telephone Company *v.* The Watervliet Turnpike and Railway Company.

[1] Hudson River Telephone Co. *v.* Watervliet Turnpike & Railway Co., 135 N. Y. 393; s. c. 121 N. Y. 403; National Telephone Co. *v.* Baker, L. R. 1893, 2 Ch. Div. 186; Central Pennsylvania Telephone & Supply Co. *v.* Wilkesbarre & Westside St. Railway Co., 11 Pa. Co. Ct. Rep. 417; Cincinnati Inclined Plane Railway Co. *v.* City & Suburban Telegraph Association, 48 Oh. St. 390; Cumberland Telephone & Telegraph Co. *v.* United Electric Railway Co., 42 Fed. Rep. 273; Cumberland Telegraph & Telephone Co. *v.* United El. Ry. Co., 29 S. W. Rep. 104; Rocky Mountain Bell Telephone Co. *v.* Salt Lake City Railroad Co., 3 Jud. Dist. Utah, Dec. T. 1889; Central Union Telephone Co. *v.* Sprague El. Ry. & Motor Co., 2 Am. El. Cas. 307. Cf. East Tennessee Telephone Co. *v.* Chattanooga El. St. Ry. Co., 2 Am. El. Cas. 323, and *ante*, §§ 105–109, 182–186.

In this case the Hudson River Telephone Company had installed and was maintaining and operating a telephone exchange system in the city of Albany, New York, under permission of the municipal authorities. The Watervliet Turnpike & Railway Company was incorporated originally long prior to the incorporation of the telephone company, as a turnpike company, and constructed a turnpike leading into the city of Albany from the adjacent country. Due authority had been given it at a later date to construct and operate a horse railway over the turnpike, and it had built and had been, for a long time prior to the installation of the telephone system, operating such a horse railway. Subsequent to the installation of the telephone system, and just before the bringing of the suit in question, the railway company had equipped its street railway for operation by the single trolley overhead system, and was about beginning the operation of the street railway by this means when the telephone company applied for an injunction, both preliminary and final. The preliminary injunction was granted, and a motion to dissolve it was denied. The motion was then taken by appeal through several inferior courts to the court of appeals, which refused to reverse the order of the court below, denying the removal of the injunction on the ground that this matter was wholly in the discretion of the lower court, and this discretion could not be reviewed by the court of appeals. The court, however, in rendering this decision, makes a short examination of the various points arising in the case with a view to the subsequent trial of the case on the merits in the court below, and among other things says as follows: —

§ 215. **Same Subject** (*continued*). — "It appears with reasonable certainty, from the complaint and affidavits made on the motion for the injunction, that the operation of the defendant's road by the single trolley system will result in serious disturbance of the telephone service. It is sufficient for the

present purposes to state that this apprehended disturbance will arise in two ways. First, by the actual distribution of the current of electricity conveyed by the trolley wire suspended over the road of the defendant, and then fed to the motors on the appellant's cars, and thence discharged on to the rails and track, which discharged current will in part find its way through the earth to any neighboring conductors of electricity, including wires used by the plaintiffs for the earth or ground circuit of the telephone system; and second, by what is called induction, that is, by inducing on the telephone currents of electricity corresponding in variation with the variable currents used on the trolley wire. The effect of each of these causes, as appears by the testimony of the electrical experts, is to confuse and drown the minute current used in the telephone service, and prevent or greatly interfere with communication by the telephone."

The court further says, that although the telephone company alleges that other modes of constructing the railway would prevent the trouble, yet it does not allege that the mode adopted by the railway is an improper or unsuitable one, or that the railway apparatus is negligently constructed, and that the evidence shows that the single trolley is the best method of operating street railways by electricity, taking into consideration the electrical, mechanical, and commercial factors in the case, and that the metallic circuit in the telephone system would not only avoid the trouble but improve the general service of the telephones. The court further says, on the telephone company's claim, "A claim that under this permissory grant [of right to maintain poles in the streets] they can exclude the use of the streets by electric railways or for other purposes requiring the use of electricity whenever the use of this agent interferes with the use of the telephone, although the municipality may consent, and the public interests will be furthered by the other uses to which the streets are sought to be subjected, needs but to

be stated to induce hesitation," and proceeds to state that the matter involves such important interests as will be better decided upon the final hearing on the merits of the case, when such hearing shall be reached in the course of litigation.[1]

§ 216. **Same Subject** (*continued*). — This intimation of the views of the judges of the Court of Appeals was confirmed when the case came before them again, on appeal from the final decree in the court below on the merits of the case. This decree dismissed the complaint of the telephone company, and that company took an appeal to the Court of Appeals. That court, in the opinion rendered by Maynard, J., after reviewing the authority of both companies to the use of the streets for the operation of their business, and finding that each company was legally in the occupation thereof, continues: —

"There is no question of prior equities involved. It is a matter of strict legal right. Neither priority of grant nor priority of occupation can avail either party. The plaintiff has a franchise which is entitled to protection, but the prime difficulty it encounters grows out of its subordinate character. It has been given and accepted upon the express condition that it shall not obstruct or interfere with the enjoyment by the defendant of its franchises. The plaintiff is not using the streets for one of the purposes to which they have been dedicated as public highways, while the defendant is occupying them in such a manner as to expedite public travel and promote the public use to which they were originally devoted. The condition created in the plaintiff's grant would have been implied had it not been expressly stated.

"The primary and dominant purpose of a street is for public passage, and any appropriation of it by legislative

[1] Hudson River Telephone Co. *v.* Watervliet Turnpike & Ry. Co., 121 N. Y. 403.

sanction to other objects must be deemed to be in subordination to this use, unless a contrary intent is clearly expressed. The inconvenience or loss which others may suffer from the adoption of a mode of locomotion authorized by law which is carefully and skilfully employed, and which does not destroy or impair the usefulness of a street as a public way, is not sufficient cause for a recovery unless there is some statute which makes it actionable. A different rule prevails if there has been an encroachment upon private rights to the extent of an appropriation of private property; and it was upon this ground that the decree in the elevated railroad cases was placed. It was there held that an abutting owner has an easement of light, air, and access in the street in front of his premises, of which he cannot lawfully be deprived without compensation, by the erection and use of an elevated railroad structure. But the plaintiff has no easement in the public streets. It is there by virtue of a legislative grant, revocable at pleasure of the power which made it, constituting while it continues a valuable franchise which is regarded as property in the fullest sense of the term. The plaintiff's title to his property is, however, encumbered by a condition which diminishes its value, and it cannot rightfully complain of the burden which it has voluntarily assumed. It is a part of its compact with the State that the maintenance of its lines of communication shall not prevent the adoption of any safe, convenient, and expeditious mode of transit, such as the defendant's system has been shown to be. It is not deprived of any property right, but is simply compelled to yield the subservience which it is bound to render under the charter which gave its existence."

The court thus places its decision upon the ground that the use of the streets for telephonic purposes is a use not contemplated by the original dedication of the streets, and not included in the primary and most important use for

which the streets are laid out, and that this subordination of the telephone use to the rights of public travel would be implied in cases where it was not actually expressed in the permission given to the telephone company by the municipal authorities and by the statutes. The court then proceeds to discuss the question of whether a company which collects large quantities of electricity in a turbulent and dangerous form, and discharges the same upon the land or property of another, thereby causing injury, is responsible in damages for the injury thus inflicted, but says that the decision of this point is not involved in the decision of the case as it comes before them on the record, since the telephone franchise is an indivisible franchise, and being subordinate in all respects to the rights of public travel, cannot be considered in this light.[1]

§ 217. **Same Subject** (*continued*). — The same questions were considered in a case in Pennsylvania in one of the county courts. In this case the telephone company, as in the New York case, was legally occupying the streets with the wires and poles of its telephone system. The electric railway was constructed legally under the authority granted by the municipal authorities, and under the provisions of its charter. The court considers the various kinds of injury which the electric railway inflicts upon the telephone company when the latter uses the earth for its return circuit and the modes in which this injury may be prevented, and makes a summary of the duties of the respective parties as follows: An electric passenger railway company is bound to use reasonable care and prudence in placing its wires and poles, and to adopt all ordinary and usual appliances and methods to prevent contact between its trolley and feed wires, and the wires of a telephone company stretched along or across the same highway. An electric railway company failing to exercise this

[1] Hudson River Telephone Co. *v.* Watervliet Turnpike & Ry. Co., 135 N. Y. 393. Cf. *post*, §§ 220, 221.

degree of care may be restrained by injunction from operating its line until this defect in construction is remedied. If actual contact between the wires of the railway company and of the telephone company may, in most instances, be prevented by guard wires, it will be considered negligence in the railway company if it does not place such wires.

It is the duty of a telephone company using a public highway for its poles and wires to so construct and maintain its line as not to incommode the public use of the highway for the purposes of travel and transportation, whether by ordinary vehicles, horse railroads, or electric passenger railways lawfully used on the same. Hence if the wires of the telephone company are so low in crossing a street that the wires of the railway company cannot go under them without actual contact, the telephone company must raise its wires even though it was prior in use of the streets. If, however, the original construction of the telephone lines was not negligent in thus being of not sufficient height above the street to allow the railway wires to cross underneath without contact, then the telephone company may recover from the railway company the expense of this change, since it was not rendered necessary by the original faulty construction of the telephone system.[1]

§ 218. **Same Subject** (*continued*). — In another case recently decided in the Supreme Court of Ohio, where the telephone company raised the usual objections to the operation of a single trolley electric railway system, both parties being rightfully in the occupation of the streets, the court says as follows: —

"Considering that the mode adopted by the railway company of propelling its cars by electricity is an interruption to the telephone service of the defendant in error, and calculated to impair its franchise in the manner contended, the

[1] Central Pennsylvania Telephone & Supply Co. *v.* Wilkesbarre & Westside St. Ry. Co., 11 Pa. Co. Ct. R. 417.

inquiry is suggested whether the railway company must yield up a useful franchise that the same may be exclusively enjoyed by the telephone association, or whether the association shall adapt its system to existing conditions; whether the railway company shall change from the single to the double trolley system, from the grounded to the metallic circuit, or whether the telephone association shall use either a complete metallic circuit or resort to the McCluer device. It is immaterial upon which party the expense of the change may fall the more heavily. . . . The authority given by statute to a telephone company to construct its lines from point to point along and upon any public road, under the continuing prohibition that the same shall not incommode the public in the use of the road, would plainly indicate an intention on the part of the legislature that the company shall exercise such franchise with reference to the comfort and convenience of the travelling public, and shall not, in any manner, abridge or impair the use by the public of the most approved methods of travel and transportation; and a reasonable interpretation of this statute would lead to the conclusion that to impair the public enjoyment of an approved method of conveyance on the streets would be in derogation of the statutory prohibition that the public shall not be incommoded in the use of the roads or the highways. The statutory permission to the telephone association to construct its telephone lines along and upon the highways was not, therefore, without qualification; but whether the legislature had or had not imposed the condition that the public should not be incommoded, the association, in our opinion, acquired its privilege or permissory grant subject to the duty of so changing and adjusting, when necessary, its system of operating its telephone line as not to control the enjoyment by the public of the best modes of travel and transportation in the streets." [1]

[1] Cincinnati Inclined Plane Railway Co. *v.* City & Suburban Telegraph Association, 48 Oh. St. 390.

§ 219. Same Subject (*continued*). — The same points were discussed in another case as follows: "Are the telephone companies, which have the prior right to use the streets, bound to conform their business to the demands of these newcomers, though by so doing they put themselves to large expense; or are the railway companies bound, as a condition of occupying the same territory, to see to it that, in operating their roads, no incidental damage is done to their neighbors? If the existence of one was absolutely incompatible with the continued operation of the other, it might be incumbent upon us to make a choice between these two great benefactions, both of which will rank among the necessities of modern urban life. But, as we are bound to assume that they can be persuaded to live together in harmony, the case resolves itself into a question of liability for certain damages sustained by the complainant. . . .

"If in the case under consideration it were shown that the double trolley would obviate the injury to complainant, without exposing itself or the public to any great inconvenience or a large expense, we think it would be its duty to make use of it, and should have no doubt of our power to aid the complainant by an injunction; but as the proofs show that a more effectual and less objectionable and expensive remedy is open to the complainant, we think the obligation is upon the telephone company to adopt it, and that defendants are not bound to indemnify it; in other words, that the damage incidentally done to complainant is not such as is justly chargeable to the defendants. Unless we are to hold that the telephone company has a monopoly of the use of the earth, and of all the earth within the city of Nashville, for its feeble current, not only as against the defendants, but as against all forms of electrical energy which, in the progress of science and invention, may hereafter require its use, we do not see how this bill can be

maintained. We place our denial of an injunction upon the grounds: —

1. That the defendants are making lawful use of the franchise conferred upon them by the State in a manner contemplated by the statute itself, and that such an act cannot be considered a nuisance in itself.

2. That, in the exercise of such franchise, no negligence has been shown, and no wanton or unnecessary disregard of the rights of the complainant.

3. That the damages occasioned to complainant are not the direct consequence of the construction of the defendants' roads, but are incidental damages resulting from their operation, and are not recoverable."[1]

§ 220. **Same Subject** (*continued*). — In a case between the same parties, however, in the State court, the telephone company asking damages for the expense of changing its system so as to protect it from the railway current, the court held that it might have damages for the injury caused by conduction or leakage, because that took place on private property, *i. e.*, the railway current leaked out into the street, and thence into private lands, and thence reached the telephone ground wires and did the mischief.[2] And this case suggests the point taken in the English case of National Telephone Co. *v.* Baker,[3] where the court likens the case to Fletcher *v.* Rylands. It would seem as if the contention of the telephone companies had some strength if put in this way; *i. e.*, the electric current of the electric railway company leaves the highway and comes into private land, and on to the private property of the tele-

[1] The Cumberland Telephone & Telegraph Co. *v.* The United Electric Railway Co., 42 Fed. Rep. 273.

[2] Cumberland Telegraph & Telephone Co. *v.* The United El. Ry. Co., 29 S. W. Rep. 104. Cf. Rocky Mountain Bell Telephone Co. *v.* Salt Lake City R. R. Co., Utah Ter., 3d Jud. Dist. Dec. Term, 1889; and Wisc. Stat. 1889, c. 375, § 1.

[3] L. R. 1893, 2 Ch. Div. 186. See next section.

phone company, and interferes with its use. Put on this ground, it is difficult to see how the electric railway could defend its action unless the courts make it simply a question of negligence and due care.

§ 221. **Same Subject, English Case.** — In the case in England referred to above, the court sustained the rule, that the telephone company cannot complain of the disturbance in its operations caused by the electric current of the railway, but on different grounds from the American cases. The court holds, first, that the principle of Fletcher *v.* Rylands[1] applies; *i. e.*, that if the owner of land use it for any purpose which from its character may be called a non-natural use, such as, for example, the introduction upon the land of something which in the natural condition of the land is not upon it, he does so at his own peril, and is liable, if sensible damage results to his neighbor's land, or if the latter's legitimate enjoyment of his land is thereby materially curtailed; and therefore that the railway is liable to the telephone company for the results of the electricity which it discharges into the ground. The court, however, held that as the railway company had express legislative authority for operating its railway by electricity, the action of the railway company was protected by the statute on the ground taken in England, that nothing which is protected by Act of Parliament can be a nuisance.[2]

§ 222. **Guard Wires.** — A street railway company may, in some instances, be compelled to adopt guard wires, or such other form of construction as may avoid danger of the crossing of wires by a falling of the telephone or other wire upon the trolley wires. Thus it has been held that when there was a city ordinance requiring guard wires over the trolley wire, a telephone company whose line crossed the trolley wire might compel the railway company to adopt these pre-

[1] L. R. 3 H. L. 330.

[2] National Telephone Co. *v.* Baker, L. R. 1893, 2 Ch. Div. 186.

cautions as being the only way to protect the telephone company from danger of injury to its property and employees by such crossings.[1] But it is a question of fact for the jury whether the lack of guard wire is negligence.[2] The opinions of experts do not seem harmonious as to the necessity or even advisability of guard wires.[3]

§ 223. **Telegraph v. Electric Light.** — The use of the same street or side of the street for both telegraph and electric light wires may bring up a question of which of the two uses of electricity is entitled to the precedence. The electric light wires carry, as is well known, a heavy and dangerous electric current, which may, in case of sagging or breaking of the electric light or telegraph wires, be distributed over the telegraph wires and burn out the instruments and endanger the lives and safety of the employees of the telegraph company. On the other hand, the wires may be so adjusted that both companies can use the same side of the street with safety. The question which of the companies must make this adjustment of its wires depends upon the question of which company was prior in its occupation of the streets with its wires. If the telegraph company has strung its wires along the street, and is carrying on the telegraphing business, the electric light company cannot, even under a municipal ordinance granting it such power, string its wires within such distance of the wires of the telegraph company or in such a manner as to create a danger, such as has been specified above, and a court of equity will enjoin the electric light company from so stringing its wires.[4] On the other hand, if the electric light company has already strung its

[1] State *ex rel.* Wisconsin Telephone Co. *v.* Janesville Street Railway Co., 87 Wis. 72.

[2] Block *v.* Milwaukee St. Ry. Co., 61 N. W. Rep. 1101.

[3] See also Central Pennsylvania Telephone and Supply Co. *v.* Wilkesbarre & Westside St. Ry. Co., 11 Pa. Co. Ct. R. 417.

[4] Western Union Telegraph Co. *v.* Guernsey & Scudder Electric Light Co., 46 Mo. App. 120.

wires, and is operating them, the telegraph company cannot compel it to remove them so as to allow it to occupy the street even under the franchise and protection of the Act of Congress of July 14, 1866, United States Revised Statutes, Section 5263, unless in no other way can it avail itself of this franchise.[1]

§ 224. **Telephone v. Electric Light.** — In a case where the occupation of the streets by the wires of the telephone and electric light companies was nearly contemporaneous, both companies having valid grants from the city authorities of the right to occupy the street, the court, on the facts of the case, held that the occupation by the electric light company of a portion of the street in question was prior in time, and therefore that the telephone company could not enjoin the use of the street by the electric light company for carrying on its business. As to the rest of the streets, however, which had not been occupied by either company, the decree was issued by the court enjoining the electric light company from using the same side of the street with the telephone company for any of its arc light wires, and from stringing any of its incandescent light wires on the same side of the street with the telephone wires within eight feet of the latter, and then only for a distance of three hundred yards.[2] In another case, where the telephone was prior in right and occupancy, and the electric light had only a later franchise, the court enjoined the latter from placing its wires so close to the telephone wires as to impair the telephone service,[3] and in a similar case the electric light wires were ordered to the other side of the street, the telephone being prior in occupancy, and being injured in operation by the electric light wires.[4]

[1] Ib.; see also, *ante*, § 48.

[2] Nebraska Telephone Co. *v.* York Gas & Electric Light Co., 27 Neb. 284.

[3] Paris Electric Light & Railway Co. *v.* S. W. Telegraph & Telephone Co., 27 S. W. Rep. 902 (Tex.).

[4] Bell Telephone Co. *v.* Belleville El. Light Co., 12 Ont. Rep. 571.

§ 225. **Electric Light v. Electric Light.** — As between two electric light lines, if the prior company is legally occupying the streets, no other company will be allowed to string its wires so near to the wires of the prior company as to materially interfere with its business or create danger to life and property.[1] In a case in Alabama the company first in occupation of the street sought to enjoin another company which was attempting to set its poles and string its wires on the same side of the street, and in such proximity as to create danger from the sagging or breaking of the wires of either company, and the court issued an injunction as requested, but put it more upon the ground of the danger to the public safety from the double occupation than on any right of exclusive possession by the prior company.[2]

§ 226. **Removal of Gas Posts.** — In a case in Louisiana extraordinary powers were given to an electric light company, in its grant of a right of way in the streets for poles, its powers extending not only to setting its own poles and stringing its wires, but also to the removal of any obstructions to the same. This was inserted with a view to enabling the electric light company to remove the gas posts which had been set by a gas-light company under a previous contract with the city for lighting the streets. This contract expired, and the gas company no longer used the posts for lighting the streets, but allowed them to remain there. The person who secured the electric franchise, in the course of construction of the electric lighting system, began to take down these gas posts as obstructions. The gas-light company brought suit to enjoin him; but the court decided that, the city gas lighting contract having expired, the gas company had no longer a right to maintain its poles in the streets

[1] Rutland Electric Light Co. *v.* Marble City Electric Light Co., 65 Vt. 337.

[2] Consolidated Electric Light Co. *v.* People's Electric Light & Gas Co , 94 Ala. 372.

under its franchise, and the electric light company might remove them.[1]

§ 227. **Electric Railway crossing Steam Railway Tracks.** — In many cases the construction of an electric railway renders it necessary to cross a steam railway track at grade, or *vice versa*. The steam railways are averse to this crossing both because of the additional danger of collision, and also because of the competition of electric railways. There have been several cases, therefore, where there have been bitter contests, both in court and upon the grounds. The general rule, in the absence of statutory provisions, is that an electric street railway which has obtained due authority from the municipal authorities, may in the absence of statutory restrictions, cross a steam railway's tracks at grade against the wishes of the steam railway company, for travel over the highway is paramount to travel on the steam railway. The relative positions of the steam railway and an electric railway at a grade crossing have been stated in New Jersey to be as follows: The steam railroad is subordinate to the right of public travel over the public highway. It has simply the right to cross the highway because of the necessity of this crossing to enable the steam lines to reach distant places. From the speed and momentum of the trains, however, they necessarily have a right of way paramount to travellers upon the ordinary highway, and the latter are obliged to stop, look, and listen before crossing a steam road if they wish to avoid negligent conduct. In all other respects, however, the right of public travel over the highway is paramount, and when the selectmen or municipal authorities have duly granted a street railway company the right to lay its tracks and string its wires upon the highway, this cannot be interfered with by the steam railroad company, in the absence of statutory authority, provided the electric railway company lays its tracks and strings its wires

[1] New Orleans Gas Light Co. *v.* Hart, 40 La. An. 474.

in such a manner as not to interfere with the operation of the steam road.[1]

In New York, however, it is held that when an electric street railway crosses a steam railway track the provisions of the steam railroad act regulating the crossing of one steam railroad by another apply, and commissioners must be appointed and regular proceedings had.[2]

§ 228. **Michigan: Crossings of Steam and Electric Railways.** — It is unlawful by statute in this State for any railroad company to construct its tracks across the tracks of any street railroad, or for any street railroad company whether operated by horses, cable, electricity, or other motive power, to construct its tracks across the tracks of any railroad company until the place where and the manner in which such crossing shall be made shall have been approved by the commissioner of railroads,[3] and the statute makes provision for hearings of all parties interested before the commissioner. The crossings are not to be at grade if possible. Stringing of wires over the tracks is also made dependent upon the approval of the commissioner of railroads.

§ 229. **Steam Railway removing Electric Railway's Trolley Wire.** — Under this statute it is held that where the steam railroad has the right to remove the trolley wire of an electric railway which crosses its track, it cannot do so arbitrarily in such a way and at such a time as will cause great unnecessary loss to the electric railway company and possible danger to the public. It must, if possible, choose a time when the electric railway is not in operation. Thus where the electric railway wrongfully strung its wire across the steam railroad's track at a height of nineteen feet and six

[1] West Jersey Railroad Co. *v.* Camden, G. & W. Railway Co., 29 Atl. Rep. 423. Cf. Port Richmond & P. P. El. Ry. Co. *v.* Staten Island Rapid Transit Ry. Co. (N. Y.), 39 N. E. Rep. 392.

[2] Port Richmond & P. P. El. R. Co. *v.* Staten Island Rapid Transit Co., 24 N. Y. S. 566.

[3] Acts 1893, No. 171.

inches, this being below the height prescribed by the railroad commissioner, and below the height necessary for allowing freight cars, with brakemen thereon, to safely pass under, it was held that the steam railroad company could not rightfully cut this trolley wire at four o'clock in the afternoon, when the electric road was in full operation, and when the cutting injured the machinery and caused a stoppage of cars along the whole line and some danger to the public, and if it did so, it must pay the damages caused thereby.[1]

§ 230. **Safeguards ordered by Court of Equity.** — If no statutory provisions exist as to the crossing of electric railways over steam railways a court of equity may, upon bill brought by either party to settle the matter, require such gates, flagmen, and other safeguards as it may deem necessary for the public safety.[2] If the crossing is of a very dangerous character, so that if allowed it will almost necessarily result in injury to passengers and possible loss of life, a court of equity will restrain the electric railway company from making such crossing over an existing steam railway, even though this is attempted under express statutory authority. The court does this in the exercise of its general police power by which it may prevent the construction of any system of railways which threaten the public safety.[3] Thus in Pennsylvania a case arose where the plaintiff steam railroad company brought a suit in equity to restrain the defendant electric railway company from laying a crossing at grade over the tracks of the steam company, with the alternative prayer that if the court should hold that the electric company had the right to cross the steam railroad company's tracks at the grade, the court would regulate the manner and place of the

[1] Saginaw Union St. Ry. Co. *v.* Michigan Central R. R. Co., 91 Mich. 657.

[2] Dubois Traction Passenger Railway Co. *v.* Buffalo, Rochester & Pittsburg Railway Co., 149 Pa. St. 1.

[3] Pennsylvania Railroad Co. *v.* Braddock Electric Railway Co., 152 Pa. St. 116.

crossing, and make such restrictions as it thought best to secure the safety of the passengers of both roads. At the beginning of the case a preliminary injunction was issued until the court was informed by further evidence as to the best mode of making the crossing. The facts showed that the crossing was a very dangerous one on account of the number of trains running on the steam railroad track, and the existence of a curve very near the crossing, and also the fact of a down grade on the track running towards the crossing, and other circumstances. The charter of the electric company, however, gave it the right "to cross at grade diagonally or transversely any railroad operated by steam or otherwise, now or hereafter built." The court below held that this phrase in the defendant's charter expressly authorized it to build the crossing on the level of street.

The Supreme Court, however, on appeal held that while the phrase of the defendant's charter was strongly in its favor, yet that such a grant must be considered to be subject to the police power of the court, and that as the crossing in question was shown to be so very dangerous as to involve imminent risk to the lives and persons of passengers in the street railway car, so much so that the liability to fatal accidents was very great, the court, in the exercise of its police power, and also in the exercise of authority given by the statute of May 14, 1889, which concerns crossing of one railroad over another at grade, and which enjoined upon the courts of equity to restrain and prevent the establishment of grade crossings wherever possible, might and would refuse to grant the electric railway company the right to cross the steam railroad at grade.[1]

§ 231. **Opposite Rule in Massachusetts.** — In Massachusetts, however, a contrary decision has been reached. In that State the right of an electric railway to cross a steam railway at grade is implied from the grant of location of tracks

[1] Pennsylvania R. R. Co. *v.* Braddock El. Ry. Co., 152 Pa. St. 116.

in the highway by the municipal authorities, and also from the fact that the statutes provide that the crossing of a street railway over a steam railway shall be made with as little damage to the steam railway tracks as possible. The case in which the above mentioned decision was reached was a bill in equity by the steam railroad company to enjoin the crossing. The defendant electric railway company had received proper locations of its tracks from the municipal authorities. The plaintiff contended that even with this authority the court in equity might regulate the manner of operating the electric cars over the crossing, and direct the electric railway to construct suitable safeguards, gates, signals, and other safety appliances. The court, however, declined this jurisdiction. The statutes provided certain rules as to stopping the car at a certain distance from the crossing before going over, and the court said that as the statutes had provided certain safeguards, and as the electric railway had a statutory right to make the crossing, there was no reason for the interference of a court of equity.[1]

§ 232. **Equitable Injunction.** — A court of equity is always inclined to prevent acts of violent destruction of property, and therefore if an electric company reasonably apprehends that its property is to be destroyed by its opponents, it can obtain a temporary injunction from a court of equity to restrain this breach of the peace. It is not necessary that in such a case the right of the electric company should be beyond question. It is sufficient if it has a clear *prima facie* right, and that the other party is actually threatening destruction to the property. In a recent case in Pennsylvania an electric railway company had obtained the consent of the county commissioners to lay its tracks upon a bridge which was one half within the county and one half within the city of Philadelphia. The city authorities claimed that

[1] Old Colony Railroad Co. *v.* Rockland & Abington Street Railway Co., 161 Mass. 416.

the consent of the city of Philadelphia was necessary even on that part of the bridge which lay outside the city, because it had been built partly with the money of the city of Philadelphia. The court said that without deciding the question as to which of the two litigants was right, it would issue a temporary injunction to prevent the rails of the electric company being torn up until the matter could come before the court for a full hearing.[1] On the other hand, if no violence is apprehended nor irremediable injury, the court will dissolve a preliminary injunction, and leave questions of right for settlement at final hearing.[2] The plaintiff in asking for a preliminary injunction from a court of equity is obliged to make out a clear *prima facie* case of right as well as a reasonable apprehension of irremediable injury. If the right of the plaintiff appears to be doubtful, the court will generally refuse the injunction unless the damage threatened is of a very serious nature, and the injury to be done by restraining the defendant would be very slight. The court, in doubtful cases, always inclines to refusing the injunction.[3]

§ 233. **Telegraph Company v. Steam Railway Company.** — The right of a telegraph company to string its wires along the franchise of a steam railway company has already been considered,[4] and depends upon the statutes giving the telegraph company this right as an exercise of the right of eminent domain, the easement being acquired as a public use of the property of the railroad company. A different question arises when the telegraph company merely crosses the line of the steam railway company. In such cases it is

[1] Delaware County & Philadelphia Electric Railway Co. *v.* Philadelphia, 164 Pa. St. 457. Cf. Newark Pass. Ry. Co. *v.* East Orange, 31 Atl. Rep. 722.

[2] Union Street Railway Co. *v.* Hazleton & North Side Electric Railway Co., 151 Pa. St. 422.

[3] Willis *v.* Erie Telegraph & Telephone Co., 37 Minn. 347; Union Street Railway Co. *v.* Hazleton & North Side Electric Railway Co., 154 Pa. St. 422.

[4] *Supra*, §§ 62, 119–125.

not often that any serious difficulty arises, for generally the crossing can be made, with a little care, to be perfectly innocuous to both parties. Cases have arisen, however, in which the telegraph company has located its wires in such a way as to interfere with the operation of the steam railroad. Such a case arose in England, where the telegraph company was empowered by its charter to carry its lines directly across the railway company's right of way, provided it did not interfere with the railway company's business. Acting under this power, the telegraph company put its wires in tubes which were laid along the highway underground and across and underneath the tracks of the railway company. The railway company objected to this method of locating the wires as interfering with its business. The proof showed that the existence of these tubes running across the railway bed made it more difficult to repair the railway tracks and embankment when such repairs were necessary. The court held that, this being the case, the telegraph company was bound to string its wires on poles over the tracks of the railway company, and at such height as not to interfere with its business.[1]

[1] Southwestern Railway Co. *v.* European, etc. Telegraph Co., 9 Exch. 363. See also, *post*, § 249; Southwestern Telegraph & Telephone Co. *v.* Crank, 27 S. W. Rep. 38; Dillingham *v.* Crank, 27 S. W. Rep. 93.

CHAPTER IX.

CONSTRUCTION AND MAINTENANCE OF LINES.

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§ 234. **General View.** — The rules affecting the electric companies on the two subjects of construction and maintenance are so closely connected and depend so much on the same general principles, that it is more convenient to discuss them together. Moreover, the rules applicable to these subjects present no characteristic features different from ordinary rules of construction and maintenance, except so far as concerns the distinguishing characteristics of electric companies, *i. e.*, their electrical apparatus, and their use of the public highways with their poles and wires, and (in the case of railways) tracks and cars. To these features, therefore,

the discussion will be directed mainly, and especially to the use of the highways, as upon this use most of the characteristic decisions have turned. The general rule affecting electric companies in this regard in the United States is the rule of due care, and its converse, negligence. The electric companies are not bound to have perfect apparatus nor perfect construction, nor necessarily the latest improvements in construction,[1] nor to keep the instruments, poles, and wires in perfect repair, nor do they insure the public nor their employees against accidents therefrom; but they are bound to use reasonable care in the construction and maintenance of their lines and apparatus, that is, such care as a reasonable man would use under the circumstances, and will be responsible for any conduct falling short of this standard.[2] It follows from this rule, that the amount of care necessary varies with the danger which is incurred by negligence, for a prudent and reasonable man increases his care with the increase of danger.[3] If but little danger is incurred, as, for instance, when the wires carry only a harmless electric current, such, for instance, as the telegraph or telephone current, only ordinary care may be required.[4] While if the wires carry a strong and dangerous current of electricity, so that negligence will be likely to result in serious acci-

[1] Lorimer *v.* St. Paul City Ry. Co., 48 Minn. 391.

[2] Ward *v.* Atlantic & Pacific Telegraph Co., 71 N. Y. 81; Flood *v.* Western Union Telegraph Co., 131 N. Y. 603; Western Union Telegraph Co. *v.* Eyser, 2 Col. 148; s. c. 91 U. S. 495; Southwestern Telegraph & Telephone Co. *v.* Robinson, 1 C. C. A. 684, s. c. 50 Fed. Rep. 810; Lee *v.* Electric Light, Heat & Power Co., 140 Pa. St. 618; Lorimer *v.* St. Paul Street Railway Co., 48 Minn. 391; Brunner *v.* American Telegraph & Telephone Co., 160 Pa. St. 300; Thomas *v.* Western Union Telegraph Co., 100 Mass. 156; Essex County Electric Light Co. *v.* Kelley, 29 Atl. Rep. 427; Byron *v.* New York State Printing Telegraph Co., 26 Barb. 39; Henning *v.* Western Union Telegraph Co., 41 Fed. Rep. 861.

[3] Ward *v.* Atlantic & Pacific Telegraph Co., 71 N. Y. 85; Ahern *v.* Oregon Telephone & Telegraph Co., 35 Pac. Rep. 549.

[4] Ward *v.* Atlantic, etc. Telegraph Co., 71 N. Y. 81; Western Union Telegraph Co. *v.* Eyser, 2 Col. 148; s. c. 91 U. S. 495.

dents, and perhaps death, or if a harmless wire is in dangerous proximity to a high tension wire, a very high degree of care, indeed, the highest that human prudence is equal to, is necessary. This is particularly true of electric light and electric railway wires, which carry a high tension current often of great danger.[1] The rule is thus stated in a case in Massachusetts. "The vigilance and attention required must conform to the nature of the emergency and the danger to which others may be exposed, and is always to be judged of according to the subject-matter, the danger and force of the material under the defendant's charge."[2] The question of whether or not reasonable care has been used is in all cases for the jury, except where the court, on undisputed facts, can say that no reasonable man would have acted in the manner complained of, or that a reasonable man must have acted in the manner complained of. Between these limits the whole question is for the jury.[3] Furthermore, as in all actions for negligence the question of the conduct of the plaintiff is involved, and if he has been guilty of contributory negligence, that is, of conduct which a reasonable and prudent man would not have adopted under the circumstances, and this conduct has contributed directly to his injury, he cannot recover therefor.[4]

[1] Ahern *v.* Oregon Telephone & Telegraph Co., 35 Pac. Rep. 549; Texarkana Gas & Electric Light Co. *v.* Orr, 27 S. W. Rep. 66; Haynes *v.* Raleigh Gas Co. 19 S. E. Rep. 344; Uggla *v.* West End Street Railway Co., 160 Mass. 351.

[2] Uggla *v.* West End St. Ry. Co., *supra.*

[3] Lee *v.* Electric Light, Heat & Power Co., 140 Pa. St. 618; Brunner *v.* American Telegraph & Telephone Co., 160 Pa. St. 300; Ward *v.* Atlantic, etc. Telegraph Co., 71 N. Y. 81; Foley *v.* Jersey City Electric Light Co., 54 N. J. L. 411; Southwestern Telegraph & Telephone Co. *v.* Woughter, 56 Ark. 206; Southwestern Telegraph & Telephone Co. *v.* Robinson, 50 Fed. Rep. 810; Thomas *v.* Western Union Telegraph Co., 100 Mass. 156. See also Liability to Employers, §§ 266–272, and cases on Operation, *post*, §§ 409, 429, 764.

[4] Lee *v.* Electric Light, Heat & Power Co., 140 Pa. St. 618; Foley *v.* Jersey City Electric Light Co., 54 N. J. L. 411; Flood *v.* Western Union

While, as has been said above, the whole question is one of negligence in the United States, in England a different doctrine is apparently applied to electric wires, and the rule of Fletcher *v.* Rylands[1] governs such cases, at least as regards dangerous currents. That case, as is well known, decides that when an owner of land brings upon it, for his own purposes, and collects and keeps there anything likely to do mischief if it escapes, he must keep it in at his peril, and if he does not do so, he is *prima facie* answerable for all the damage that is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default, or perhaps that the escape was the consequence of *vis major* or the act of God. This rule has been applied in England to an electric railway, which, using a strong electric current, discharges it into the ground, thereby interfering with the operation of a telephone line.[2] This case is said by the court to be analogous in its facts to the facts of Fletcher *v.* Rylands, and the court held that the railway company would have been held liable for all damages resulting from the discharge of electricity into the ground, had it not been authorized by statute so to do, which authorization in England precludes any question of damages resulting from the performance of the authorized act. How far this principle will be applied in England, whether it will be extended to electric light currents, and whether it will be applied in its full extent to electric railways, cannot well be predicted. In the United States the doctrine of Fletcher *v.* Rylands has not been adopted generally,[3] and the question is considered wholly one of negligence, as above

Telegraph Co., 131 N. Y. 603; Thomas *v.* Western Union Telegraph Co., 100 Mass. 156; Texarkana Gas & Electric Light Co. *v.* Orr, 27 S. W. Rep. 66.

[1] L. R., 3 H. L. 330.

[2] National Telephone Co. *v.* Baker, L. R., 1893, 2 Ch. Div. 201; see *supra*, § 221.

[3] Cooley, Torts, p. 573; National Telephone Co. *v.* Baker, *supra*.

stated; but the rulings of the courts requiring the very highest degree of care in cases where the dangerous electric currents are involved shows a tendency to the same ground.[1]

§ 235. **Liability for Negligence.** — The liability of electric companies for negligence in the construction and maintenance of their lines may be divided into two classes.

First. The liability to travellers upon the highway and the public at large.

Second. The liability to employees.

In the latter class considerations as to the assumption of risk are involved, and it will therefore be advisable to treat such cases separately.[2]

§ 236. **Construction and Maintenance of Lines as affecting Travellers on the Highway.** — Electric companies are bound to use reasonable care in the construction and maintenance of their poles and wires along highways. They must exercise reasonable care in selecting sound and strong poles and cross-arms and wires, and other apparatus, and in keeping them in good condition.[3] They are not obliged to have poles so strong and secure that no possible stress of weather can blow them over or break them,[4] but are only bound to have poles sufficiently strong to withstand any stress of weather or other violence which may reasonably be expected to occur in the locality of the poles.[5] In the case cited, which is an early and leading case on the subject, the plaintiff's intestate, a traveller on the highway, brought suit

[1] Compare the strictness of rulings on notice in § 251.

[2] See *post*, ch. x.

[3] Flood *v.* Western Union Telegraph Co., 131 N. Y. 603; Western Union Telegraph Co. *v.* Levi, 47 Ind. 552; Foley *v.* Jersey City Electric Light Co., 54 N. J. L. 411; Southwestern Telegraph & Telephone Co. *v.* Woughter, 56 Ark. 206; Lee *v.* Electric Light, Heat & Power Co., 140 Pa. St. 618; Clairain *v.* Western Union Telegraph Co., 40 La. An. 178.

[4] Ward *v.* Atlantic, etc. Telegraph Co., 71 N. Y. 81.

[5] Ibid.

against the telegraph company for damages caused by the falling on him of a pole belonging to the defendant company, and on which its wires were strung. This occurred during a heavy snow storm which dragged over the pole. The question decided on appeal was whether the company was obliged to secure its poles against the violence of any possible storm, or whether it was only obliged to secure them against such weather as might reasonably be expected in the place in which they were set. The defendant requested the trial court to instruct the jury that the defendant was not bound so to make or manage the line as to guard against storms of unusual severity, the occurrence of which could not reasonably be expected. The court refused to give this instruction, and the Court of Appeal held that this refusal of the court, in view of the fact of the peculiar strength of the storm in question, might have influenced the jury wrongfully; that if they had been instructed that the duty of the company was only to set the poles so as to withstand any weather that might reasonably be expected to occur in the place, they might have found a verdict for the defendant on the ground that the storm in question was of extraordinary violence, such as the defendant company had no reason to anticipate. The court says: "The defendant (telegraph company) is not absolutely bound to make its line safe to the public, to have its posts in the streets so strong and secure that they cannot be blown down or broken by any storm. It does not insure the safety of travellers in the street from injuries by its posts lawfully placed there. It is bound to use reasonable care in the construction and maintenance of its line, so that no traveller shall be injured by it, and the amount of care must be proportioned to the amount of danger and the liability to accident. The poles must be strong enough to withstand such violent storms as may reasonably be expected, but they are not required to be so strong that no storm can break them, or to withstand

such storms as reasonable foresight and prudence could not anticipate." [1]

§ 237. **Liability for Blasting.** — In the course of setting electric poles it often becomes necessary to blast, and a recent case in Pennsylvania decides that in such cases if the blasting is done negligently and without sufficient warning to travellers on the highway, and thereby a traveller is injured, as, for instance, by his horse being frightened and running away, the traveller can recover compensation from the company.[2] In this case the company was constructing a long distance telephone line. To do this it employed two separate gangs of workmen, one the digging gang, and the other the pole gang. The digging gang had dynamite cartridges for use in blasting, and a member of the digging gang, thinking that some of the cartridges were wet, handed them to a member of the pole gang who was near by to test them and see if they would explode. They did, and frightened the horse of the plaintiff who was driving by. The trial court submitted the question of negligence to the jury, instructing them that if they found that the acts of the employees in the line of their duty caused the injury, the company would be liable therefor. The principal question in the case was whether the act of the member of the pole gang who exploded the cartridge was in the line of his duty so as to render the company liable therefor, and the plaintiff claimed that if the member of the digging gang handed the cartridge to the member of the pole gang for the purpose of testing it, that the act of the member of the pole gang was, in effect, the act of the member of the digging gang, whose duty it was to test the cartridges, and the company was liable. The case was so left to the jury, and the Supreme

[1] For the same reasons, an anchor wire, supporting a post may be so near the highway as to constitute negligent construction. Sheldon *v.* Western Union Telegraph Co., 51 Hun, 591. And see cases on railway posts being too near the track, *post*, § 730.

[2] Brunner *v.* American Telegraph & Telephone Co., 160 Pa. St. 300.

Court held that it was correctly left. A liability may also arise if the electric company, in the process of construction, negligently leaves its poles or other materials in the street. Thus a telegraph company has been held liable to a traveller if it negligently leaves its poles in the street during construction, whereby the traveller was injured, the question of negligence being for the jury.[1] So it has been held that if a street railway company leaves its rails in the street while building, and a traveller is injured, he may recover damages therefor, and that if a person walking on the sidewalk of a street after dark attempts, on account of the crowd in front of him, to cross over to the other side of the street, and in so doing runs against a pile of new rails placed in the street by a street railway company, for the purpose of repair of its tracks, these facts do not as a matter of law show negligence on his part, even though he crosses the street at a point where there is no paved crossing.[2] The case cited was an action against the city upon its duty to keep the highway free from obstructions, but the action would have lain also against the railway company.

§ 238. **Statutes regulating Construction.** — In a few States, statutes have been enacted which specify certain kinds of construction which must be followed by the electric companies, or which put the whole matter under the supervision of the municipal authorities. So far as such statutes exist, their provisions must of course be followed by electric companies in the construction of their lines. The statutes are as follows: —

§ 239. **Statutes, Alabama, Telegraph.** — In this State every telegraph company must at every point where the wires cross any private or public road, erect substantial, durable, and permanent posts or piers to prevent the falling of the wires so as to obstruct or interfere with travel on such roads, and

[1] Postal Telegraph Cable Co. *v.* Zopfi, 60 Fed. Rep. 987.

[2] Slee *v.* Lawrence, 22 Banker & Tradesmen, No. 44, p. 16; Mass. Supreme Jud. Ct.; 162 Mass. 405.

upon failing to erect such posts or piers, and upon the falling of any telegraph wires so as to obstruct or interfere with travel on such road, it is the duty of any justice of the county, upon complaint that the wires of the telegraph line have so fallen, to issue notice to any officer or agent of such company to be found in the county to appear before him at such time not short of ten days' notice that he may appoint, and upon proof that the wires are down or have been down for one day he shall enter a fine of not less than ten nor more than fifty dollars for every day the wires are permitted to remain down.[1]

If no officer or agent of the company is found in the county, then notice posted at two or more places near the line of telegraph in the neighborhood of the place where the wires have fallen, citing the company for five days to appear before a justice of the peace, shall be deemed and held sufficient notice, and if the company shall not defend by some officer or agent, a fine may be entered by default, and if the company shall fail or refuse for the space of sixty days to pay any fine so imposed, such telegraph line shall be deemed a public nuisance, and upon due notice the same shall be subject to be abated as such by proceedings before the Circuit Court of the county in which such wires are permitted to continue down, in the same manner as other nuisances are abated.[2]

§ 240. **Statutes, Delaware, Telegraph.** — In this State telegraph wires must be attached to the poles at least twelve feet above the ground, except where they enter a house, and if any agent of a telegraph company, having supervision of the line, suffers this provision to be violated for ten days after notice by mail directed to him at the post-office nearest his residence, he shall forfeit and pay twenty dollars to any one who will sue for the same.[3]

[1] Code, § 1432.
[2] Ib. § 1433.
[3] Rev. Code, p. 938, ch. 128, § 19.

§ 241. **Statutes, Massachusetts, Telegraph and Telephone.** — In this State the selectmen may establish reasonable regulations for the erection and maintenance of all telegraph and telephone lines within their respective towns, including all lines owned or used by said towns, and may permit the same to be laid under any public way or square.[1] The town shall forthwith notify the owner, or constructor of, or parties using any line therein constructed or maintained in violation of such regulations, of such violation, by a writing setting forth the same particularly; and if after such notice such construction is proceeded with, or if said lines are not within a reasonable time so altered as to conform to said regulations, the Supreme Judicial Court or a justice thereof, in term time or vacation, may enjoin the further progress of said work until the facts of the case are determined; and if it appears that such regulations have been violated, the court may enjoin the further prosecution of the work, or order such line to be removed or altered as it may deem proper, at the expense of the owners or constructors thereof, or the persons using the same. If such line belongs to, or is used by a town or by any of its departments, the like action may be taken, upon complaint of a party injured, after such notice to the town, as the court or a justice thereof may order.[2] Regulations established by a city under the provisions of this act must be made by ordinance.[3]

§ 242. **Massachusetts Statutes, All Electric Lines.** — By a further statute in this State every corporation or person maintaining or operating a telephonic, telegraphic, or other electrical line, or any one who in any manner affixes or causes to be affixed to the property of another, any post, structure, fixture, wire, or other apparatus for telephonic, telegraphic, or other electrical communication, or enters upon the property of another for the purpose of affixing the

[1] Pub. Stat. ch. 27, § 47.
[2] Ib. § 48.
[3] Ib. c. 28, § 4.

same without first obtaining the consent of the owner or lawful agent of the owner of such property, must upon complaint of such owner or his tenant be punished by fine not exceeding one hundred dollars.[1] Every corporation or person maintaining or operating a telephonic or telegraphic or other electrical line must at all places where such line is affixed by any post, structure, or fixture to the property of another, mark such post, structure, or fixture in a clear, durable, and legible manner with the name of the corporation or person maintaining or operating such line, and any corporation or person failing to comply with the provisions of this section shall, for each failure so to comply, be punished by fine not exceeding one hundred dollars.[2]

§ 243. **Statutes, Massachusetts.** — By still further statutory provision, every person or corporation, private or municipal, owning or operating a line or wires over streets or buildings in any city, must use only wires that are suitable and strong; must suitably and safely attach them to strong and sufficient supports, and insulate them at all points of attachment; must remove all wires abandoned for use; must suitably insulate every wire where it enters a building, and if such wire is other than a wire designed to carry an electric light or power current, must attach to it at suitable and convenient points in the circuit, calculated to prevent danger from fire and near the place of entering the building, an appliance calculated to prevent at all times a current of electricity of such intensity or volume as to be capable of injuring electrical instruments or causing fire from entering the building by means of such wire beyond the point at which such appliance is attached, and must suitably insulate every wire within a building when such wire is designed to carry an electric-light current.[3] Every such person and corporation shall, in the several cities, within six months

[1] Acts of 1884, c. 302, § 1. [2] Ib. § 2.

[3] Acts of 1890, c. 404, § 1. Posts must be insulated. Acts 1895, c. 228.

after the appointment of the wire commissioner, affix at the points of support at which any such wire or cable containing wires is attached, a tag or mark distinctly designating the owner or user of such wire or cable. No such tag or mark shall be required for the wires of a street railway company used for the transmission of its motive power nor for the protection or support of such wires.[1]

§ 244. **Statutes, Ohio, Light and Power.** — In this State all light and power wires must be covered with a water-proof insulation, and their poles, piers, abutments, and wires shall be so located and arranged as not to interfere with the successful operation of existing telegraph and telephone wires.[2]

§ 245. **Statutes, Vermont, Telegraph, Telephone, Electric Light.** — In this State all telegraph or telephone or electric light companies or associations, and all persons owning or operating a telegraph or telephone or electric light line, shall cause the poles now or hereafter erected on the line of any highway within the limits of any city or village in this State to be suitably painted to the satisfaction of the trustees or selectmen of such village or aldermen of such city, and shall substitute straight poles in place of crooked poles now or hereafter erected.[3] Whoever shall paint or post any sign, advertisement, or notice on any telegraph, telephone, or electric light pole shall, for each offence, forfeit five dollars to the village or city in which such pole is situated.[4]

§ 246. **Wisconsin Statutes, Electric Light and Power.** — It shall be the duty of each and every electric light and power company, and of each and every person engaged in the transmission of electrical energy within this State, to provide by suitable insulation, return wires, or other means, against injury to persons or property by leakage, escape, or induction

[1] Acts of 1890, c. 401, § 2.
[2] Rev. Stats., Smith & Ben., § 8035, cl. 233.
[3] Laws 1890, No. 44, § 1. [4] Ib. § 3.

of any and every current of electricity.[1] Neglect of any of the above provisions shall entitle the person or corporation injured thereby to a preliminary injunction, preventing further use of such current until said statute has been complied with.[2]

§ 247. **Stringing Wires.** — As was said in a previous section,[3] an electric company may be guilty of negligence during construction by leaving its materials in the highways. Moreover, in the process of stringing the wires, it is often obliged to carry them across or along the highway, from one post or support to another, until they are stretched into position. All this the electric company may lawfully do if it has proper authority, but it must take care that travellers are not injured by the wire, as an obstruction in the highway.[4] Unless the wire is of such a size and character as to be readily seen by travellers approaching it at moderate speed it may be negligence not to have flagmen or other warning on each side.[5]

Thus in a case in Colorado the facts were that a telegraph company was employed in stringing its wires across a street. At the time of the accident the wire was suspended a few feet above the level of the street. The plaintiff, riding on horseback, came down the street, and his horse's feet becoming entangled in the wire, the horse and rider were thrown. There was some conflict as to whether any of the employees had warned the plaintiff, but the courts say that in such cases it may be negligence for the company stringing the wire not to have flagmen or guards stationed on each side of the wire so as to prevent travellers from accidentally coming in contact with it.[6]

§ 248. **Falling or Sagging Wires.** — An electric company is

[1] Laws 1889, c. 375, § 1. [2] Ib. § 2.

[3] *Supra*, § 237.

[4] Western Union Telegraph Co. *v.* Eyser, 2 Col. 148; s. c. 91 U. S. 495.

[5] Ibid.

[6] Western Union Telegraph Co. *v.* Eyser, 2 Col. 148, 168; s. c. 91 U. S. 495.

bound to use reasonable diligence in keeping its lines in repair, and seeing that its wires do not fall or sag down and obstruct the highway, and if it negligently allows them so to fall or sag, and this falling or sagging is known to the company, or continues for such a time that the electric company might have known it if it had exercised reasonable care in inspecting its lines, the electric company will be responsible in damages for any injury done to travellers through this negligence in the absence of negligence on the part of the latter.[1] The injury to the traveller may be caused by mechanical contact of himself or horse or carriage with the hanging wire, causing physical injury,[2] or it may be by the discharge of electricity from the wire, causing electrical injury,[3] and the right of the injured party to recover damages may exist, although the wire with which he came in contact was ordinarily a harmless wire, but through negligence of the defendant, had crossed or was crossed by a wire containing a powerful electric current, which was thus delivered over the previously harmless wire to the injury of the plaintiff,[4] and there will be no liability of the owner of

[1] Southwestern Telegraph & Telephone Co. *v.* Robinson, 1 C. C. A. 684; s. c. 50 Fed. Rep. 810; Western Union Telegraph Co. *v.* Eyser, 2 Col. 148, 168; s. c. 91 U. S. 495; Thomas *v.* Western Union Telegraph Co., 100 Mass. 156; Allen *v.* Atlantic, etc. Telegraph Co., 21 Hun (N. Y.), 22; Dickey *v.* Maine Telegraph Co., 46 Me. 488; s. c. 43 Me. 492; Southern Bell Telephone & Telegraph Co. *v.* Lynch, 20 S. E. Rep. 500; Henning *v.* Western Union Telegraph Co., 41 Fed. Rep. 864.

[2] Dickey *v.* Maine Telegraph Co., 46 Me. 488; Allen *v.* Atlantic, etc. Telegraph Co., 21 Hun (N. Y.), 22; Western Union Telegraph Co. *v.* Eyser, 2 Col. 148; s. c. 91 U. S. 495.

[3] Southwestern Telegraph & Telephone Co. *v.* Robinson, 1 C. C. A. 684; Henning *v.* Western Union Telegraph Co., 41 Fed. Rep. 864; Texarkana Gas & Electric Light Co. *v.* Orr, 27 S. W. Rep. 66; Bourget *v.* Cambridge, 156 Mass. 393; Haynes *v.* Raleigh Gas Co., 19 S. E. Rep. 344.

[4] Henning *v.* Western Union Telegraph Co., 41 Fed. Rep. 864; Bourget *v.* Cambridge, *supra;* Haynes *v.* Raleigh Gas Co., 19 S. E. Rep. 344; Southwestern Telegraph & Telephone Co. *v.* Robinson, 50 Fed. Rep. 812. Cf. *Supra*, § 234.

the powerful wire in such a case if there is no negligence on its part. Thus when a telegraph or telephone wire falls on to a trolley wire, and one end falling to the street diverts the electric current of the trolley wire on to a horse and kills him, the street railway company is not liable for this, for it is guilty of no negligence if its road is built and maintained in proper manner. Even the lack of a guard wire in such a case is not evidence of negligence unless it is shown that such a wire is necessary or usual in the careful construction of such roads.[1]

If the wire has been lowered through the falling or leaning of a pole, the question of negligence reverts to the sufficiency of the setting or strength of the pole. As was said above,[2] the poles must be reasonably secure, and strong enough to withstand any stress of weather or other disturbing cause which might reasonably be expected. The question is simply whether the electric company has used reasonable care.[3] In the case of Allen *v.* Telegraph Company there was evidence that the falling of the pole in question was the result of the collision of a runaway team with the pole shortly previous to the accident. The trial court instructed the jury that the defendant company, as a matter of law, should have its poles set so firmly as to withstand the collision of a runaway team, but on appeal, this instruction was held to be incorrect, the question being whether the pole is set with reasonable strength, and this question, under all the circumstances of the case, being for the jury.[4] The fact that the person injured is travelling along the highway outside of the ordinarily

[1] Albany *v.* Watervliet Turnpike & Ry. Co., 76 Hun, 136. See *ante*, § 222.

[2] *Supra*, § 236.

[3] Ward *v.* Atlantic, etc. Telegraph Co., 71 N. Y. 81; Allen *v.* Atlantic, etc. Telegraph Co., 21 Hun (N. Y.), 22; Johnson *v.* Northwestern Telephone Exchange Co., 51 N. W. Rep. 225.

[4] Allen *v.* Atlantic, etc. Telegraph Co., 21 Hun (N. Y.), 22.

travelled part does not relieve the electric company from responsibility, for although the town might not be responsible for injuries received by a traveller so travelling outside of the portion of the way prepared by the town for public travel, yet the case is different when the action is against a third party who has wrongfully placed obstructions upon the highway.[1] A similar liability may arise when electric wires are strung over and across steam railway tracks. Thus in a case in Texas the facts were that a telephone wire had sagged down across a railway track so that it caught a brakeman riding on top of a freight car and threw him off, whereby he was injured. He brought suit against both the telephone company and the receiver of the railway company, and recovered judgment against both. The court held that the facts showed evident negligence on the part of the telephone company and the railway company, and that as the telephone wire had been in that location before the railroad track was built thereunder, it was the duty of the railway company, if it wished to have the wire raised for the passage of its trains, to notify the telephone company to this effect.[2]

§ 249. **Falling or Sagging Wire Evidence of Negligence, Contributory Negligence.** — The fact that an electric wire sags or falls down on or across a street in such a way as to obstruct passage over it by horses and carriages and foot-passengers, is in itself, if unexplained, sufficient *prima facie* evidence of negligence on the part of the electric company, and it is not necessary for a person who has been injured by such wire to show the cause of its hanging down and forming an obstruction to travel in the street,[3] but while this sagging or falling is evidence of negligence, the conduct of the person injured may have been such as to contribute to the injury,

[1] Dickey *v.* Maine Telegraph Co., 46 Me. 488.

[2] Southwestern Telegraph & Telephone Co. *v.* Crank, 27 S. W. Rep. 38; Dillingham *v.* Crank, Ib. 93.

[3] Thomas *v.* Western Union Telegraph Co., 100 Mass. 156; Haynes *v.* Raleigh Gas Co., 19 S. E. Rep. 344. Cf. *post*, § 252.

and in such a case he cannot recover damages. Thus if the wire is near the ground, and the plaintiff who is driving with a team thinks he can safely drive over it, and he attempts to do so, but the wire catches one of the hind wheels of the wagon and thus frightens the horse, which runs away and is injured, these facts constitute a question for the jury as to whether the plaintiff was guilty of contributory negligence, or was justified in assuming that he could thus pass over the wire.[1]

§ 250. **Wire broken by Storm. Negligence and Contributory Negligence.** — When an electric wire is broken by a storm and falls on a public highway, the question of whether the company is liable for an accident to a traveller which may occur by reason of its being on the street, depends upon the negligence of the company in allowing the wire to remain on the street, and the knowledge of the company of its being there, or its effort or lack of effort to obtain such knowledge, the whole question of negligence being for the jury. In a recent case there was evidence that an electric light plant had been not long installed in a town in Texas, when one night after midnight a very severe electrical storm occurred, which not only threw down the lines of the company in many places, but also frightened the employees of the electric light company in the power station by its effect on the machinery. They ascertained, however, by tests that wires had fallen, but not the exact locality. The deceased, for whose death suit was brought, was walking along the street at about six o'clock in the morning of the same day (the prostration of the wires having occurred at about two o'clock in the morning), and after some conversation with a bystander about the danger of the wires, picked up a dead wire. A policeman standing near by told him to throw it down, and he did so, but "flipped" it, as a witness said,

[1] Thomas *v.* Western Union Telegraph Co., 100 Mass. 156. Cf. *post*, § 252, and Ahern *v.* Oregon Telephone & Telegraph Co., 35 Pac. Rep. 549.

into the air while so doing. The wire struck a live wire before the deceased let go of the end, and thereby transmitted a current through him which killed him at once. The plaintiff (his administrator) brought suit under a statute for this injury, and the court held that the question of whether or not the deceased had been guilty of contributory negligence was for the jury; that the question of his knowledge or ignorance of the position and condition of the wires was an element in the question of contributory negligence; and further, that the evidence showing that the electric light company had made tests at the power-house which showed that a ground existed somewhere in the lines, and had not investigated the matter within four hours from the time of information of the ground, was sufficient evidence of negligence to allow the jury to find a verdict for the plaintiff thereon, and that the evidence was sufficient to show such carelessness as would render punitive damages appropriate.[1]

§ 251. **Contributory Negligence. Voluntarily touching Electric Wire.** — One who is travelling along a highway and sees a loose electric wire upon the street, with nothing to show that it is a live or dangerous wire, may voluntarily pick it up and throw it out of the highway, and if the wire is a live wire, and he is injured thereby, he can recover damages, for picking up the wire and throwing it out of the way is an incident of travel along the highway, and is not contributory negligence on the part of the traveller.[2] He may recover either from the electric company[3] or the city.[4] In such a case the liability of the city is for allowing a defect to continue in the highway, and it is a question for the jury whether the defect has existed long enough for the city reasonably to have known of it. In a case in Massachusetts the only proof

[1] Texarkana Gas & Electric Light Co. *v.* Orr, 27 S. W. Rep. 66.

[2] Bourget *v.* Cambridge, 156 Mass. 393; Haynes *v.* Raleigh Gas Co., 19 S. E. Rep. 344.

[3] Texarkana Gas & Electric Light Co. *v.* Orr, *supra*.

[4] Bourget *v.* Cambridge, *supra*.

of the duration of the defect was another accident which had happened a few minutes before; but the court held that the jury might have considered that the coming into existence of the concatenation of circumstances giving rise to the accident might have been inferred by the defendants' expert inspectors of wires from previous conditions existing three weeks before the accident. These conditions were that the wire in question, a telephone wire, had been hanging loose for three weeks in such a position that the wind might bring it against a dangerous electric light wire, and as a matter of fact it had caught on the glass insulator of the electric light wire so as to be kept in constant contact with it, and the insulation of the electric light wires had worn off, as might have been seen from the street. The court held these facts were sufficient for the jury to find negligence of the defendant in allowing the subsequent dropping of the telephone wire upon the street which formed the defect complained of.[1] So in a case where a guy wire of an electric light pole, becoming loose, fell upon another guy wire of another pole, which in turn fell upon a trolley wire of an electric railway, and these wires were charged with electricity, and a boy who was going along the street picked up one of them, and threw it to one side, and was killed while so doing, it was held that there was sufficient evidence of negligence of the electric light company in the fact of the looseness of the wires; and that it was not contributory negligence for a boy to pick up an electric light guy wire when there was nothing to show that it was charged with electricity from the railway line.[2]

§ 252. **Falling of Overhead Apparatus of Street Railway Evidence of Negligence.** — An electric railway company is obliged to use reasonable care in the maintenance of its overhead apparatus, and this care must be proportioned to the apparent

[1] Bourget *v.* Cambridge, 159 Mass. 388.

[2] Haynes *v.* Raleigh Gas Co., 19 S. E. Rep. 344.

danger which would result from negligence. If negligence will result in danger to life or serious physical injury, the care exercised by the railway company must be of a high degree.[1] If a portion of the overhead structure supporting the trolley wire falls and injures a traveller, the falling itself is evidence of negligence, which, if not contradicted or explained, will support a verdict.[2] But if the railway company puts in evidence of due care on its part, as, for instance, that the break in the apparatus was bright and clear, showing that there was no flaw in the iron which broke, also that the apparatus was made and put up by a maker having the best reputation for careful work, and that the manner of construction was the best known at the time, and that the company had a corps of inspectors who inspected the apparatus weekly, and that this particular portion had been inspected within the week of the accident, then the question of negligence is for the jury to decide, whether, upon the facts, the defendant had exercised such a degree of care as relieved it from liability.[3]

§ 253. **Falling of Wires occasioned by Fires, Negligent Removal.** — If a building takes fire, and in the course of putting it out electric wires are cut or thrown into the street, the electric company must not allow them negligently to remain there and become obstructions in the highway or dangerous to travellers.[4] Thus in a case in Minnesota the facts were that a telephone company had strung its wires on the cross-arms of its poles along a street in a city, and had maintained them there for some time. One of the buildings abutting on the street took fire on a very cold day in winter, and the fire-engines in playing upon it threw water over and upon the cross-arms of the defendant company's poles. This

[1] Uggla *v.* West End St. Ry. Co., 160 Mass. 351.
[2] Ibid. Cf. *ante*, § 249.
[3] Uggla *v.* West End St. Ry. Co., *supra*.
[4] Nichols *v.* Minneapolis, 33 Minn. 430.

water froze, and finally became so heavy that it broke the cross-arms from the poles, and the wires and cross-arms fell to the ground. At the same time the water from the engines fell upon this debris, froze, and thus fixed the wires and cross-arms solidly to the sidewalk on the street, and extending partially into the carriage-way of the street. After the fire the telephone company cut off the frozen wires, and splicing the ends, restored their lines to their original order, leaving the frozen portions on the street. Some person not belonging to the telephone company put a rope across the sidewalk so as to prevent passers-by from stumbling against the frozen wires and ice on the sidewalk, but did not guard the portion in the carriage-way. The plaintiff, returning about six o'clock from his place of business, which was on this street, to his home, walked along the sidewalk until he reached the rope, and then turning out into the street, stumbled on one of the exposed pieces of wire frozen to the ground in the street and fell, injuring himself, for which injury he brought suit against the city, and the city summoned in the telephone company as co-defendant. The court held that the telephone company was liable on the ground that it had allowed the detached portions of the wire frozen to the street to remain there an unreasonable time. It held that although the original falling of the wires to the street was not negligence of the telephone company, since it was brought about by agencies beyond its control, yet the allowing them to remain there as an obstruction to travel longer than was reasonably sufficient for the company to have removed them after the fire, was negligence on its part. The defendant tried to liken the case to the case of a person whose property is, without his consent, placed upon the highway by a third party; but the court held that this was not an analogous case, for the defendant company had itself placed its wires upon the highway originally by stringing them upon its poles under license from the municipal

authorities, and that having thus placed its poles upon the highway, it was bound to use reasonable care to see that they did not become an obstruction to travel. The court, in speaking of the obligation of the company, says, "The company is under an obligation to maintain as well as erect, and if the company places its property on the street under a license from the town, and if it becomes unsafe, whether by wear or sudden casualty, and the company allows it to remain so an unreasonable time, it is liable." [1]

§ 254. **Wire attached to Building.** — In many instances wires are attached to roofs or other portions of buildings. This practice has considerable danger, and may be prohibited by city ordinance, such an ordinance being a valid exercise of the police power of the city, and providing for the safety of the inhabitants.[2] If the wire is attached to a building without the consent or permission of the owner, and causes damage to the premises, the company which places it there will be liable therefor.[3] In an early case, the gas company attached for its own use a telegraph wire to the corner of the chimney of the plaintiff's house. During a heavy gale of wind the chimney was blown down or dragged down by the wire. It caused some damage to the roof, and injured a horse and wagon in the street, for which injury the owner of the horse brought suit against the owner of the building. The owner of the building notified the gas company to come in and defend the suit, but it was settled before the case came to trial, the owner of the house paying a certain sum to settle it. He then brought suit against the gas company for the amount which he had paid to settle this suit and also

[1] Nichols *v.* Minneapolis, 33 Minn. 430. For other cases of liability of cities, see *ante*, §§ 237, 247, 251; *post*, § 254.

[2] Electric Improvement Co. *v.* San Francisco, 45 Fed. Rep. 593; Electric Improvement Co. *v.* Scannell, Ib. 596. Compare remarks concerning ordering wires underground, on the constitutionality of these ordinances, *supra*, § 166. As to right gained by prescription, see *supra*, § 87.

[3] Gray *v.* Boston Gas Light Co., 114 Mass. 149.

for the injury to his roof. The court held that he could recover from the gas company both these amounts; that the plaintiff was not joint tort-feasor with the gas company; and further, that the owner of the building, as between himself and the public, was bound to keep it in safe condition. If a city owns a telegraph wire, and in removing it from the streets a passer-by is injured, the city is liable.[1]

§ 255. **Company responsible only for its own Wires.** — In the absence of negligence on its part, one electric company is not responsible for injuries caused by the falling of wires of another company. Thus where a telegraph company permitted a messenger service company to string its wires on the poles of the telegraph company, it was held that the telegraph company was not responsible for injury done by one of the wires of the messenger company falling upon the pavement and remaining there.[2]

§ 256. **Insulation of High Tension Wires, Roofs of Buildings, Different Kinds of Wire.** — The insulation of electric light wires is one of the proper subjects of municipal or statutory regulation, and it is often provided for either by statute [3] or by ordinance; and when it is so provided for, it is negligence for an electric company not to comply with the requirement, and persons whose occupation brings them into proximity to the wires, may, in the absence of appearances showing defective insulation, assume that the company has complied with the ordinance requiring the wires to be kept perfectly insulated.[4] Even in the absence of statute or ordinance, it may be negligence for such a company to fail to keep its wires insulated, especially in places where people are likely to come in contact with them.[5] This question is for the

[1] Neuert *v.* Boston, 120 Mass. 338.

[2] Holmes *v.* Union Telegraph & Telephone Co., 16 N. Y. S. 563.

[3] See *supra*, §§ 243, 244, 246.

[4] Clements *v.* Louisiana Electric Light Co., 44 La. An. 692.

[5] Illingsworth *v.* Boston Electric Light Co., 161 Mass. 583.

jury.[1] Where an electric light wire was strung over a roof at such a height above the roof that a person walking on the roof would naturally come in contact with the wire, whether he tried to pass under or over it, and a statute required all splicings or joints to be completely insulated, it was held not to be negligence for a person who was on the roof for the purpose of repairing it, or other proper purpose, *i. e.*, not a trespasser, to adopt either method of crossing the wire; nor need he examine the insulation to see that it was perfect, provided that there was no patent and visible defect at the portion of the wire where he crossed.[2] The grouping of many wires upon a roof, sometimes of different kinds and degrees of tension, and sometimes belonging to different companies, has given rise to several accidents and cases in court. The rules that may be gathered from these cases are as follows: If one electric company allows another to string its wires upon its standard on a roof, the former must keep its own wires reasonably safe for the necessary approach of the workmen of the latter for the purpose of repairing the wires of the latter.[3] Therefore if the insulation of the former's wires negligently becomes defective, and a lineman of the latter company who is upon the roof for the purpose of repairing the wires of his company is injured, the former company is liable,[4] provided he is in the exercise of due care; and it is not necessarily negligence for him not to see defective insulation.[5] But it has been held that such a lineman cannot recover when the roof upon which he is injured is a different roof from that on which the standard is which carries the two sets of wires, and the roof on which he stands has none of the wires of his company, although he may have gone there for the purpose of stringing wires for

[1] Illingsworth *v.* Boston Electric Light Co., 161 Mass. 583.

[2] Clements *v.* Louisiana Electric Light Co., 44 La. An. 692; Giraudi *v.* El. I. Co., 40 P. Rep. 108.

[3] Illingsworth *v.* Boston Electric Light Co. 161 Mass. 583.

[4] Ibid.

[5] Ibid.

his company, and in the course of his employment,[1] the court holding that the duty which the company owning the standard owed to its licensee company putting wires on the standard only extended to such reasonable distance from the standard as the owner might expect the employees to come for purposes of repair. And in another case[2] it was held that, as against a trespasser or mere licensee, a wholly naked wire carrying a fatal current on a roof could not be negligence. It would seem as if these last two decisions limited within very narrow lines the duty of an electric company having a wire of dangerous electric tension upon a roof.

Considering the fact that the roof must be used for many purposes both by the owner of the building and his licensees and others, and in cases like the above by other electric lines, it would seem that when the electric company has a dangerous wire on a roof the question should be for the jury in all instances, except perhaps as against trespassers, whether the electric company has exercised reasonable care in keeping the insulation perfect, and that reasonable care in such a case would be a very high degree of care, though not so great as in cases of similar wires in a highway. Even in the case of trespassers it might be better policy to allow them to recover damages for the sake of the moral effect on the owners of electric wires carrying such a dangerous current. It should be understood that a wire fatal to human life *must* be looked out for by its owner.[3]

§ 257. **Negligence in removing Dead Wires.** — In the course of operation of electric lines it often happens that the company discontinues the use of certain wires, generally on account of the particular customer ceasing to use the appliances of the company, whether they may be telephones,

[1] Hector *v.* Boston Electric Light Co., 161 Mass. 558.

[2] Sullivan *v.* Boston & Albany R. R. Co., 156 Mass. 378.

[3] Cf. *supra*, § 234.

telegraphic instruments, or electric lamps. In such case the company should within a reasonable time remove the wires, the use of which is thus discontinued, or it may be liable for injuries caused by their existence. For instance, in a case in Wisconsin the facts were these. A large public hall was constructed upon a high plateau of land for the purpose of public exhibitions. On the same premises was a large barn. The proprietors of the public hall wishing the use of a telephone, the telephone company strung a wire from the highway over the land to the barn which was in the line of direction towards the hall, and attached the wire to a flag-pole on top of the barn. From this flag-pole the wire ran to a flag-pole on the top of the public hall, and thence down into the hall where the telephone was situated. The ground wire ran from the telephone up to the flag-pole on the roof of the public hall, and thence to the ground, where it was attached to a water-pipe. The proprietors of the hall having discontinued the use of the telephone, the telephone company took out the instrument and that portion of the wire which was in the hall, and also the portion which led from the highway to the barn, but left the wire stretching from the flag-pole on the barn to the flag-pole on the roof of the public hall, and also the ground wire. A severe thunder-storm coming up, a flash of lightning was seen by two witnesses to come down in the direction of the flag-staff on the public hall, which the evidence showed was shattered. Immediately thereafter the barn was found to be on fire and was destroyed. The owner of the barn brought suit against the telephone company, and the jury found that the destruction of the barn was caused by the fire which was set by the lightning striking the flag-pole on the public hall, and being thus diverted over the telephone wire to the roof of the barn. The defendant company appealed on the ground that there was no evidence of negligence, and the court held that the facts showed evidence of negligence; that the situation of

the buildings on the high land, and the well-known frequency of thunder-storms in that vicinity at certain seasons of the year were evidence of negligence from which the jury might find the fact of negligence in the telephone company in leaving its wire thus connecting the two buildings.[1] In this case the additional facts of the situation of the buildings and the likelihood of electrical storms seem to have influenced the court in its decision; but probably in any case where it appears that the use of an electric wire has been discontinued, and the wire has not been removed by the electric company within a reasonable time, and injury is done resulting directly from the existence of the wire in that place, the court would hold that these facts were evidence of negligence.[2] In Massachusetts the removal is ordered by statute.[3]

§ 258. **Removal of Wires on another Company's Fixtures.** — Every company has, in the absence of statutory provisions or municipal ordinances to the contrary, the right to have only its own wires attached to its poles and standards, and other similar fixtures for supporting wires.[4] If another company attaches its wires to such poles or standards without the permission of the company owning them or without legal authority, such other company is a trespasser, and the wires are a nuisance which may be abated by the company owning the fixtures by the removal of them. But if the employees of the company who thus remove the wires proceed to take away the wires thus removed, and appropriate them to their own use, this conversion will render the company removing the wires liable for their value; and the fact that the company did not authorize this conversion of the wires by its workmen, but only the removal from the fixtures, does not relieve it from liability, the courts holding in such case that the act of conversion is so far within the course

[1] Jackson *v.* Wisconsin Telephone Co., 88 Wisc. 243.
[2] Cf. *supra*, § 167.
[3] *supra*, § 243.
[4] Cf. *supra*, § 150.

of employment of the workmen as to render the employer liable.[1]

§ 259. **Disconnecting Wires for moving Buildings.** — The highway is sometimes used for the removal of buildings from one location to another. Such a removal cannot be considered one of the uses of the highway for public travel for which it was designed, and therefore if such removal involves the disconnecting of electric wires, it cannot be done unless by consent of the electric company or by statutory authority, which is given in several States.[2] Without such consent or authority, the person so disconnecting the lines is liable to the company for damages,[3] unless the wires are wrongfully on the street, as when they are strung below the height prescribed by the ordinances of the town.[4] The statutes are as follows: —

§ 260. **Connecticut Statute, cutting Wires for moving Buildings.** — In this State it is enacted that when it is necessary to cut or otherwise disconnect the wires of any telegraph, telephone, electric light or other company or association engaged in distributing electricity by wires or similar conductors or in using an electric wire or conductor for any purpose, or to remove them from the poles or fixtures to which they are attached for the transportation of any object on the highway or upon any water-way, any person may do so, exercising reasonable care therein, provided that before doing so he shall leave a statement in writing particularly describing the time when and the place where he wishes to disconnect such wires, at the office of such company, if any there be in the town where such place is situated, twenty-

[1] Electric Power Co. *v.* Metropolitan Telephone & Telegraph Co., 75 Hun (N. Y.), 68. As to mutual rights in cases where several companies' wires are on the same standard, see *supra*, § 256.

[2] *Infra*, §§ 260-265.

[3] New York & New Jersey Telephone Co. *v.* Dexheimer, 11 New Jersey Law Jour. 246. *Contra*, Telegraph *v.* Wilt, 11 Am. Law Journal, 374.

[4] New York & New Jersey Telephone Co. *v.* Dexheimer, *supra*.

four hours before the time so stated, and if such company has no office in the same town, he shall send such statement to its officer nearest to the place named therein, by putting it in the post-office properly directed and stamped three days before the time stated therein.[1]

§ 261. **Maine Statute, Moving Buildings.** — In this State the statute is that whoever desires to cut, disconnect, or remove the wires or poles of a telephone or electric light company in order to move a building, alter, repair, or improve a street, bridge, or way, or for any other necessary purpose, shall leave a written statement of the time when and the place where such removal is desired, at its office if it has any in that town; and if it has not, he shall send it by mail to its nearest office three days before such time; upon the expiration of which time, if such removal is not made by the company, such person may make the removal, and recover the cost thereof in an action of debt.[2]

§ 262. **Massachusetts Statute, cutting Wire for moving Building.** — By statute in this State, whoever in order to move a building, or for any necessary purpose, desires to cut, disconnect, or remove the wires of any such telegraph company, may do so, exercising reasonable care, if he has first left a written statement signed by him, of the time when and the place, described by reference to the crossings of streets or highways, where he wishes to remove said wires, at the office of the company in the town where such place is situated, twenty-four hours before the time so stated; or when there is no such office, if he has deposited such statement in the post-office, properly prepaid and directed to the company at its office nearest to said place, three days before the time mentioned in said statement.[3] Whoever wilfully cuts, disconnects, removes, or otherwise interrupts the use of any telegraph wire without first giving notice as provided

[1] Gen. Stat. § 3949.

[2] Acts 1885, c. 378, § 4.

[3] Mass. Pub. Stat. c. 109, § 17.

in the preceding section, shall be punished by fine not exceeding five hundred dollars, or imprisonment not exceeding two years, or both said penalties.[1] The two preceding sections do not apply to any wires attached to telegraph poles which have not been erected in compliance with the provisions of the law.[2]

§ 263. **New Hampshire Statute, disconnecting Wires.** — In this State the statute provides that whenever it shall be necessary to disconnect the wires of any telegraph, telephone, or electric light line, or remove their supports temporarily for any lawful purpose, the person having such occasion may do so without producing unnecessary damage, if he shall have first left a written statement, signed by him, of the time when and the place where he wishes to make such disconnection, at any office of the proprietors in the town where such place is situate, twenty-four hours before the time so stated; or when there is no such office, if he shall have deposited the statement in the post-office, directed to the proprietors at their main office, three days before the time mentioned in the statement.[3] Any person who shall disconnect any such wires, or remove their supports without first giving notice, as provided in the preceding section, shall be fined not exceeding one hundred dollars for each offence.[4]

§ 264. **New Hampshire, Liability for Injuries.** — The proprietors of any line of wires strung in a highway shall indemnify the town against all damages, costs, and expenses to which it may be subjected by reason of any insufficiency or defect in the highway occasioned by the presence of the wires and their supports therein; and they shall also be responsible directly to any party receiving injury in his person or estate from the wires or their supports, or from the use thereof by the proprietors.[5]

[1] Mass. Pub. Stat. c. 109, § 18.
[2] Ib. § 19.
[3] Pub. Stat. c. 81, § 14.
[4] Ib. § 15.
[5] Pub. Stat. N. H. c. 81, § 16.

§ 265. **Wisconsin Statutes, moving Buildings.** — In this State any person having the right so to do, who shall remove or change any building or other structure, or any timber standing or fallen, to which any telegraph or telephone lines are in any way attached, or cause the same to be done, which shall destroy, disturb, or injure the wires, poles, or other property of any telegraph or telephone company transacting business in this State, without first giving to such company, at its office nearest to such place of injury, at least twenty-four hours' previous notice thereof, shall be punished by imprisonment in the county jail not more than thirty days, or by fine not exceeding fifty dollars.[1]

[1] San. & Berr. Ann. Stat. § 4559.

NOTE. — Statutes imposing penalties for injuring wires. Owing to the impossibility of keeping electric lines constantly under the supervision of the companies owning them, and in view of the great importance of keeping the lines in operating order, in most States statutes have been enacted which inflict a penalty of either fine or imprisonment or both upon persons who wilfully injure, destroy, or interfere with the lines, including the wires and their supports and the instruments. Such statutes are generally limited, however, to telegraph lines, which would include telephone lines as being a species of telegraph, even where the telephone is not expressly mentioned, as it is in many States. In a few States the provisions of these statutes are extended to electric light and railway wires. As the statutes are substantially the same in their main provisions, it is deemed unnecessary to give them at length. The three important elements are, first, a malicious intent, second, damage to the telegraph line or some portion of it, and third, a penalty therefor. As the first two elements are the same in all statutes, it will be sufficient to give the variations of the third, namely, the penalty. The penalties are as follows. In Arkansas (including telephones), Acts 1885, Act 61; Act 107, § 9, fine not less than $200, imprisonment not more than one year, and double damages for the owner of the line for the injury to the line. California, damages to owner for negligent injury and hundredfold damages for malicious injury, and also penalty for the latter as for a misdemeanor. Civ. Code, §§ 537, 538; Pen. Code, § 591. Colorado, fine not exceeding $500; imprisonment not exceeding one year, or both, and all damages. Mill's Ann. Stat. § 574. Connecticut (including telephone, electric light and power), fine not more than $200, imprisonment not more than one year, or both. Gen. Stats. § 1477. Delaware, penalty to the company or any one suing for it, $25 for first offence; for every subsequent offence $50.

Rev. Code, p. 938, ch. 128, § 19. In this State there is a special statute relating to electric lamps and electric light wires and poles, imposing fine of not less than $10, nor more than $100, one half to go to the informer and one half to the State. Rev. Code, p. 947; Laws of Del. vol. 18, ch. 688. Florida, fine not exceeding $100, or imprisonment not exceeding twelve months. Rev. Stat. § 2537. Georgia, punishment as for a misdemeanor. Code, § 4439. Illinois, fine not exceeding $500, or imprisonment not exceeding one year, or both. Ann. Stat., ch. 38, par. 249; ch. 134, par. 5; Amended Stats. 1891, p. 205. Indiana (including telephone), fine not more than $500, nor less than $5, and imprisonment not more than six months nor less than thirty days. Ann. Stat. § 2035. Iowa, imprisonment not more than five years or fine not exceeding $500, and imprisonment not exceeding one year. Ann. Code, § 5287. Kansas, fine not exceeding $500, or imprisonment not exceeding one year, or both. Gen. Stats. § 1388. Kentucky, imprisonment not less than two nor more than ten years, Gen. Stat. p. 431, § 9; telephones, fine not less than $10 nor more than $100. Acts 1889, ch. 25. Maine (including telephone and electric light), imprisonment not more than three years, or fine not exceeding $500. Acts 1885, ch. 378, § 10. Maryland (including telephone), fine not exceeding $500, or imprisonment not exceeding one year, or both. Pub. Gen. Laws, Art. 23, § 229; Art. 27, § 251. Massachusetts, fine not exceeding $500, or imprisonment not exceeding two years, or both. Pub. Stat. ch. 27, § 46; ch. 109, § 16. Michigan, knowingly or wilfully, fine not exceeding $1000, or imprisonment not exceeding one year, or both, How. Ann. Stat. § 3690; unlawfully or intentionally, fine not exceeding $500, or imprisonment not exceeding one year, or both, Ib. § 3699; injuring telephones, fine not exceeding $100, or imprisonment not exceeding three months, or both. Ib. Suppl. § 3718 f. Minnesota, punishment as for a misdemeanor. G. S. 1894, § 6780. Mississippi, fine not exceeding $500, or imprisonment in county jail not exceeding six months, or both. Ann. Code, § 1300. Missouri (including telephone), fine not exceeding $500, or imprisonment not exceeding one year, or both. Rev. Stat. § 2731. Nevada, fine not exceeding $500, or imprisonment not exceeding six months, or both, and liability to the telegraph company in hundredfold the actual damages, and also liability to a civil suit. Gen. Stats. §§ 929, 930. New Hampshire, fine not exceeding $100. Pub. Stats. ch. 81, § 15. New Jersey, imprisonment at hard labor not exceeding two years, or fine not exceeding $200, or both. Rev., p. 217, § 115. Also penalty to the company, for the first offence $100, and all damages, and for the second offence, imprisonment not exceeding one year. Rev., p. 1175, § 7. New York, imprisonment not more than two years. Penal Code, § 639. North Carolina (including telephones), fine and imprisonment at the discretion of the court. Code, § 1118. Ohio (including telephones, electric light and electric railways), fine not more than $1000, nor less than $200, or imprisonment for not less than one nor more than three years, or both. Rev. Stats. § 3467 *a*; Laws 1893, p. 346, § 1. Oregon,

fine not exceeding $500, or imprisonment not exceeding six months, or both, and liability to the company in hundredfold the actual damages. Hill Ann. Laws, § 2001. Pennsylvania, fine not exceeding $500, and imprisonment not exceeding twelve months, or both or either. Bright. Purd. Dig., 12th ed, Crimes, p. 521, par. 289. Rhode Island, imprisonment not exceeding six months or fine not exceeding $500. Pub. Stats. ch. 242, § 30. South Carolina (including telephone and electric light), fine not exceeding $100, or imprisonment not exceeding thirty days, or both. Gen. Stats. § 2524. Tennessee, punished as for a misdemeanor, Code, § 1544; (including telephones), fine not less than $5, nor more than $50, and imprisonment at the discretion of the court. Shannon's Code Suppl., p. 135, § 9; p. 136, §§ 1–3. Texas, imprisonment not less than two months nor more than five years, or fine not less than $100, nor more than $2000. Crim. Code, § 677. Vermont, forfeit of $100 to the owner of the line, and also fine and imprisonment as in other cases of malicious acts. Rev. Laws, § 3641. Under the Vermont statute, when an action is brought against a person for injury to the telegraph line, it has been held that it is necessary to show that the telegraph line injured is such an one as comes within the description of the statute, but proof that it is the line of an incorporated company, and that it is so placed as not to incommode public travel along the highway, is sufficient under this statute. Western Union Telegraph Co. *v.* Bullard, 65 Vt. 634. Washington (including telephones), through negligence, liability to the company for all damages; maliciously, liable to the company for five times the damages, and liability to civil suit. Hill's Stats. & Codes, §§ 1562, 1568; Penal Code, §§ 292–298. West Virginia, imprisonment not exceeding twelve months, and fine not exceeding $500, and liability to the owner for all damages. Code, ch. 145, § 26 *a*. Wisconsin (including telephones), imprisonment not more than three months or a fine not exceeding $100. Code, § 4559.

CHAPTER X.

LIABILITY OF ELECTRIC COMPANY TO EMPLOYEES FOR DEFECTIVE CONSTRUCTION AND MAINTENANCE.

§ 266. Liability of Company to Employee, Assumption of Risk.
267. Duty of providing Suitable Tools and Places to work.
268. Question of Negligence.
§ 269. Latent Defects.
270. Delegation of Repairs.
271. Special Orders of Employer.
272. Contributory Negligence.

§ 266. **Liability of Company to Employee, Assumption of Risk.** — As to the liability of an electric company to its employees for defective construction and maintenance, the leading rule is, as in other branches of the law of master and servant, that the employee in entering the business, accepts all the obvious, incidental, and natural risks thereof, and the company is not liable for injuries resulting to him therefrom.[1] Thus in a case where the plaintiff, a lineman in the service of the defendant company, was called upon to ascend one of the poles of the company for the purpose of trimming a lamp at its top, and one of the steps used for climbing the pole was broken off, and the plaintiff, before attempting to go up the pole, saw this defect and ascended in safety, but in descending his foot slipped when he reached the broken step, causing him to fall from the pole, by reason of which his leg was injured, it was held that the defect which caused the accident was an open and obvious risk, and

[1] Foley *v.* Jersey City Electric Light Co., 54 N. J. L. 411; Flood *v.* Western Union Telegraph Co., 131 N. Y. 603; Junior *v.* Missouri Electric Light & Power Co., 29 S. W. Rep. 988; Southwestern Telegraph & Telephone Co. *v.* Woughter, 56 Ark. 206; Essex County Electric Co. *v.* Kelly, 29 Atl. Rep. 427 (N. J.); Byron *v.* New York St. Printing Telegraph Co., 26 Barb. 39; Clairain *v.* Western Union Telegraph Co., 40 La. An. 178. On the general subject of negligence, compare *supra*, §§ 235 *et seq.*

that the plaintiff could not recover.[1] The employee does not, however, assume risks which are greater than those ordinarily incident to the business or such as are not the natural risks of the business, and the company must take reasonable care and precaution not to expose him to such greater or non-natural risks.[2] Neither does the employee assume such risks as are latent and cannot be discovered on inspection, but are known to the employer and not communicated by it to the employee. In such a case the employing company is liable.[3] Even as to patent and obvious dangers, the employing company may be liable if the employee from youth or ignorance is incapable of appreciating them without explanation and warning. In such a case it is the duty of the employer to give such instructions and explanations, as, having in view the mental capacity of the employee, are sufficient to warn him of the risks and dangers.[4]

§ 267. **Duty of providing Suitable Tools and Places to work.** — Moreover the employer must use reasonable care in providing suitable tools and appliances with which the employee is to work, and to use reasonable care in seeing that the places in which he is to work are reasonably safe for the employee to work in.[5] But if the employee, knowing of defects in the tools or places, continues to work in them, the company is not liable.[6]

In a recent case in Massachusetts the question as to the

[1] Foley *v.* Jersey City Electric Light Co., 54 N. J. L. 412. Cf. Junior *v.* Missouri Electric Light & Power Co., 29 S. W. Rep. 988.

[2] Essex County Electric Co. *v.* Kelly, 29 Atl. Rep. 427 (N. J.).

[3] Southwestern Telegraph & Telephone Co. *v.* Woughter, 56 Ark. 206. Essex County Electric Co. *v.* Kelly, *supra*. Cf. *infra*, § 269.

[4] Southwestern Telegraph & Telephone Co. *v.* Woughter, *supra*.

[5] Essex County Electric Co. *v.* Kelly, 29 Atl. Rep. 428; Flood *v.* Western Union Telegraph Co., 131 N. Y. 603; Carroll *v.* Western Union Telegraph Co., 160 Mass. 152; Southwestern Telegraph & Telephone Co. *v.* Woughter, *supra*.

[6] Junior *v.* Missouri Electric Light & Power Co., 29 S. W. Rep. 988.

liability of an electric company for injuries to an employee caused by the falling of a telegraph pole was considered.[1] In this case a party of employees of the telegraph company were engaged in setting poles in the street. As the poles were long and heavy, the workmen had, for the purpose of raising them and putting them into the holes, what was called a "deadman," which consisted of a long pole with a half moon at the end of it extending its concave surface towards the pole, the pole resting against this half moon. The workmen pushed against the other end of the deadman, and thus raised the pole into a standing position and set it into the hole. While trying to raise one of the poles the deadman broke, and one of the laborers in the party, at the order of the foreman, attempted to use his shovel, a long-handled one, as a substitute. The shovel presented a convex surface to the pole, which, as it was being raised, slipped from the point of the shovel and fell, injuring the plaintiff. The plaintiff claimed to recover damages on the ground that the company did not supply proper tools and appliances for the work. The court, however, refused to sustain this claim, saying that there was no evidence that another deadman was not in the company's depot of tools at a convenient distance, and might have been procured to replace the one which broke.

§ 268. **Question of Negligence.** — As to tools, appliances, and places to work, the liability of the employer to the employee for injury received by the latter is wholly a question of negligence, both as to the original selection, and as to keeping in proper repair.[2] In the case of electric poles and wires, if the poles, cross-arms, and wires were selected with reasonable care, and are inspected from time to time, with reasonable care, and kept reasonably well repaired, the employer is not liable to the employee for injury resulting

[1] Carroll *v.* Western Union Telegraph Co., 160 Mass. 152.

[2] Lee *v.* Electric Light, Heat & Power Co., 140 Pa. St. 618.

from breaking or other accidents.[1] In a case in New York,[2] it appeared that the person for whose death the action was brought was a lineman of the Western Union Telegraph Company. He, while mending the lines, and for this purpose, and in the course of his employment, climbed a telegraph pole and sat on one of the cross-arms. The cross-arm broke, and he fell and was killed. In the general term of the Supreme Court a verdict was given for the plaintiff on the ground that there was negligence of the company, but the Court of Appeals reversed this decision. In this case it appeared that the arm was of the usual size and strength, and had been in use six years, and that there was no defect in it which was discernible by ordinary inspection, and that the inspection of poles actually given by the company was all that could reasonably be given, and further, that the rules of the company did not require inspectors to climb up the pole and inspect the cross-arms, and that the lineman in question knew that this was the rule of the company, as he had been employed by the company as inspector. It was held, therefore, that the company had used reasonable care in regard to the pole and cross-arms, and that the accident was caused by the rashness of the plaintiff.

In another case the accident was caused by poor wires used by the telegraph company. The facts in the case were as follows: The plaintiff's intestate, who was in the employ of the telegraph company, went up a pole to string wires on the cross-arms. In order to reach the extreme end of the cross-arm for the purpose of stringing the wire on it, he was obliged to stick his climbing iron into the pole as a support for his foot, and then lean out to the end of the cross-arm and fasten the wire to the glass insulator with nippers.

[1] Essex County Electric Co. *v.* Kelly, 29 Atl. Rep. 428; Flood *v.* Western Union Telegraph Co., 131 N.Y. 603; Clairain *v.* Western Union Telegraph Co., 40 La. An. 178.

[2] Flood *v.* Western Union Telegraph Co., 131 N. Y. 603.

The wire was stretched by a party several hundred feet ahead of him, and owing to the strain put upon the wire, and its poor quality, being full of kinks and flaws, it broke. The shock of the breaking broke the cross-arm, and the lineman fell to the ground and was killed. The court held that as the accident was caused by the poor quality of the wire, it not being a patent defect, the plaintiff's intestate could recover damages.[1]

§ 269. **Latent Defects.** — In order to render the employer liable for latent defects in the poles or cross-arms, causing breakage, it must be shown that he knew of such defects, or might have known them by the exercise of reasonable care, and did not inform the employee of them.[2] If due inspection would not disclose the defects the employer is not liable.[3] In a recent case in New Jersey an electric light pole fell while one of the linemen was on one of the cross-bars, and inflicted injuries upon him. The facts were that the pole had been in use two years to support electric light wires, and was to be changed by the company to another location. The lineman in question went up the pole and cut off the wires, and after he came down the pole fell, partially detaching a cross-bar and otherwise injuring the pole. It then was carried to the new location, and after being examined by the linemen it was set up in place, and he climbed up again to string the wires on it, and used for this purpose what is called a strap and vise, by which the wires are strained into position to keep them taut. As he applied this strain to the wire in question, the pole fell carrying him with it, and

[1] Clairain *v.* Western Union Telegraph Co., 40 La. An. 178. As to the question of whether it is necessary to use the latest appliances, see Lorimer *v.* St. Paul City Ry. Co., 48 Minn. 391.

[2] Essex County Electric Co. *v.* Kelly, 29 Atl. Rep. 428; Southwestern Telegraph & Telephone Co. *v.* Woughter, 56 Ark. 206; Deane *v.* Roaring Forks Electric Light & Power Co., 39 Pac. Rep. 346.

[3] Essex County Electric Co. *v.* Kelly, *supra;* Flood *v.* Western Union Telegraph Co., 131 N. Y. 603.

inflicting injuries. The cause of the fall was either a defect in the core or an injury received in the previous fall. The court discussed at some length the duty of the master to his servant in regard to furnishing sufficient poles in case of electric companies, and lays down certain propositions as applicable to the subject. "The master must take reasonable care to have the tools and appliances with which, and the places on and about which the servant is to be employed reasonably safe for the work he, the latter, is employed to do. . . . The company did not guarantee the safety of the pole. . . . Its duty is satisfied if it has taken reasonable care to provide a pole of sufficient strength to bear the strain of the wires, and the weight of the servant employed thereon to do what is required to fit them for the service of the company. . . . The master is not responsible for defects in the pole which the closest examination would not disclose. . . . The company must also take reasonable care to preserve the pole in fit condition, and for this purpose to reasonably examine whether or not it becomes unfit and unsafe from wear and tear or otherwise; and in New Jersey this duty of keeping the appliances in repair may be discharged by selecting and employing competent persons to make inspection and repairs." [1]

The court in this case held that the plaintiff could not recover because the defect in the pole was either a decay in the core, which no inspection by the company's servants could have discovered, or the weakness was caused by the previous fall, which the plaintiff saw and knew as much about as the company.

§ 270. **Delegation of Repairs.** — It is held in some States that the employer may escape liability for lack of repair if he delegates the duty of attending to the repairs to skilful agents or superintendents, selected with due care.[2]

[1] Essex County Electric Co. *v.* Kelly, 29 Atl. Rep. 427.
[2] Ibid.

§ 271. **Special Orders of Employer.** — When the employing company is present at the work by some superintendent or officer whose orders the employee is bound to obey, and takes direct charge of the work, giving special orders as to the manner of performing it, the employer is liable if the employee obeying these orders is injured, if the defect or risk causing the injury was not so open or apparent that a reasonably prudent man would refuse to obey the order even at the risk of losing his employment by so refusing.[1] But even in such case the employer is not liable if there has been no negligence on his part, and the accident was caused by a defect not discernible by reasonable inspection.[2] Thus, in one case, the pole in question was, to all outward appearances, safe, but was, in fact, defective and unsafe. The defendant company's manager employed the plaintiff in changing poles along the line, and personally supervised their removal, in the course of which he ordered the plaintiff to climb the pole in question, and detach the wires as quickly as he could. Both examined the pole and decided it was safe. The plaintiff then climbed the pole, and as soon as the wires were cut the pole fell. The Court held that as the defect was not obvious there was no contributory negligence of the plaintiff, and that the question whether the defendant was negligent or not depended upon whether it had used the means which a prudent man would or ought to use, to discover defects in the pole, and had failed to make known to the plaintiff the defects and probable risk, this question being for the jury.[3]

§ 272. **Contributory Negligence.** — In cases where the negligence of the employer is involved, the negligence of the

[1] Southwestern Telegraph & Telephone Co. *v.* Woughter, 56 Ark. 206. Cf. Carroll *v.* Western Union Telegraph Co., 160 Mass. 152.

[2] Southwestern Telegraph & Telephone Co. *v.* Woughter, *supra.*

[3] Southwestern Telegraph & Telephone Co. *v.* Woughter, 56 Ark. 206.

employee may be also involved, and his recovery may be defeated by showing such lack of care as contributes directly and proximately to the action.[1] But even though the employee may be in the exercise of due care and the employer may be negligent, it does not follow that the employee can recover, for the injury may have been caused by one of the obvious incidental risks of the employment assumed by the employee.[2]

[1] Flood *v.* Western Union Telegraph Co., 131 N. Y. 603; Essex County Electric Co. *v.* Kelly, 29 Atl. Rep. 428; Lee *v.* Electric Light, Heat, & Power Co., 140 Pa. St. 618.

[2] Foley *v.* Jersey City Electric Light Co., 54 N. J. L. 414. Cf. *supra*, § 266.

CHAPTER XI.

SUBMARINE TELEGRAPH LINES.

§ 273. Submarine Telegraph Lines. § 274. Submarine Telegraph. Fouling Anchor. English Rule.

§ 273. **Submarine Telegraph Lines. Construction and Maintenance.** — The subservience of the telegraph in the United States to purposes of travel on the highways is by statute extended to navigation on navigable waters, and lines, if laid under such waters, must be laid and also maintained so as not to obstruct navigation; and the happening of an accident to a vessel caused by the lines is *prima facie* proof that they were not so laid and maintained.[1] And if the line is properly laid on the bottom of the stream, but afterwards rises so as to become an obstruction to navigation, the telegraph company is liable for damages to vessels injured thereby.[2] Thus in a case in New York[3] the cable was laid across the Hudson River, a public navigable stream, close by and underneath a drawbridge. A steam tug passing through the bridge fouled the cable and brought suit for the damage. The court held that the telegraph company was responsible; that it must, under its legislative franchise, lay and maintain its lines so as not to injuriously interfere with navigation; that the fact of the injury was proof that the navigation was obstructed; the fact that other vessels had felt the cables in

[1] Western Union Telegraph Co. *v.* Inman & I. S. S. Co., 59 Fed. Rep. 365; City of Richmond, The, 43 Fed. Rep. 85; Stephens & Condit Transportation Co. *v.* Western Union Telegraph Co., 8 Ben. 502; Blanchard *v.* Western Union Telegraph Co., 60 N. Y. 510; Cf. *supra*, §§ 38–58 and 61.

[2] Cases *supra*, note 1.

[3] Blanchard *v.* Western Union Telegraph Co., 60 N. Y. 510.

passing did not make it necessary for navigators to adapt their vessels to this exigency, though if the boat, knowing of the danger, had wilfully run on the cable, the case might have been different.

In a later case the principle was again asserted that the telegraph occupies navigable streams in subordination to navigation. The facts were these: The Inman S. S. Co. had a dock and pier in Hoboken, N. J., at which their steamships were accustomed to load and unload. The approach to the pier directly in front of it was obstructed by a mud bank and was comparatively shallow. The approach to the docks on either side was deep, and the steamships usually ran into the docks alongside the pier. The Western Union Telegraph Co. had laid submarine cables from New York to Hoboken, which came into the Hoboken shore just in front of this pier in the comparatively shallow water. This was done without the consent of the owners of the pier, but they had knowledge of the fact that the cables were there. On one occasion a steamer of the Inman line, approaching the pier, found that another steamer of the same line was lying on one side of it, and the dock on the other side was filled with lighters. It therefore ran along the end of the pier and discharged its passengers. As the tide fell, it became partially aground, and wishing to back out before the vessel was strained by lying on the uneven bottom, two tugs were employed with hawsers endeavoring to pull the stern of the vessel round out into the stream. These hawsers broke, and the vessel then endeavored to back out by reversing its own screw. At the same time, the tugs got out new hawsers at the side and attempted to swing the stern round towards the stream. In this way the vessel backed out, pulling itself over the mud bank and into water where it floated. In the course of so doing, the second mate, who was on the stern, observed an old pile to come up to the surface of the water, and thinking that it might have been pulled up by the screw and have injured it,

on the next day an examination was made, and several portions of the cables of the telegraph company were found wound around the screw, for which injury the telegraph company brought a libel against the steamship company, and the steamship company brought a cross libel for injury to the screw. The court asserted again the paramount claim of navigation over the telegraphic lines, and held that the vessel in question was, in fact, being navigated, since it was backing out from the wharf under its own power, and that the franchise which the telegraph company had to lay its cables expressly provided that they should not interfere with navigation, and therefore that the steamship company was not liable for damages to the cable, but the telegraph company was liable for damages to the steamship.[1]

§ 274. **Submarine Telegraph. Fouling Anchor. English Rule.** — A different rule prevails in England, however, where the telegraph is not by statute put in a subservient position to navigation. It is there held that if a vessel's anchor fouls a subaqueous telegraph line, both parties being in the exercise of their proper rights, the whole matter is a question of negligence only; that if the vessel injures the cable by its negligence, the telegraph company may have damages therefor. Thus in one case the essential facts were that the telegraph company had, under due authority, laid its submarine cable. The defendant's vessel anchored near it, and the anchor fouling the cable, the cable broke when the anchor was weighed. The case came up on demurrer to the pleadings, and the court examined all the pleadings and held that it was a mere question of negligence; that the telegraph company had an unquestionable right to lay its cable where it did, and the vessel had an unquestionable right to anchor where it did, and the only question was whether the vessel

[1] Western Union Telegraph Co. *v.* Inman & I. S. S. Co., 59 Fed. Rep. 365; affirming same case, *sub nom.* The City of Richmond, 43 Fed. Rep. 85.

anchored negligently; that is, whether or not the captain knew or ought to have known that there was a cable in that vicinity, there being no marks or buoys to distinguish it, and this question of negligence was for the jury.[1] The English Court of Admiralty further considered the question of injury to subaqueous cables in a later case,[2] and held that if the cable is lawfully in place, and the vessel lawfully anchors in a place where the anchor becomes entangled with the cable, it is the duty of the crew on weighing the anchor to disentangle the cable, if possible, without injury to it, and they must apply ordinary skill and take all the time necessary for this, unless the vessel is thereby put into imminent danger, in which case the cable may be cut; and that as the cable in that case was cut before due effort to disentangle it had been made, the vessel was responsible for the damages.[3]

[1] Submarine Telegraphic Co. *v.* Dickson, 15 C. B. (N. S.) 759. In a case decided in the Federal Court of the United States in Georgia, a vessel, manned and sailed by Portuguese, entered an inlet across which a submarine cable had been laid, and which was marked on each shore of the inlet by a large sign saying, "Cable. Don't anchor." It did not appear in evidence whether the Portuguese could read English or not; but as a fact, the vessel anchored immediately over the cable, and when the anchor was weighed, it came up with it, being fouled in the flukes of the anchor, and one of the men cut the cable in two with an axe. The court discussed the question of which would have been in fault had their rights been equal; but as it appeared that the telegraph company had been illegally organized, the court held that its cable was a nuisance in the navigable stream, and the company could not recover damages against the vessel owners for the severance of the cable. Doboy & Union Island Telegraph Co. *v.* DeMagathias, 25 Fed. Rep. 697. In California and Washington by statute, the telegraph company may recover, if it puts up signs indicating the position of the submarine line, Cal. Civ. Code, §§ 537, 539; Wash. Hill's St. & Codes, §§ 1562, 1566.

[2] The Clara Killam, L. R. 3 Adm. & Eccl. 161.

[3] Cf. Stephens & Condit Transportation Co. *v.* Western Union Telegraph Co., 8 Ben. 502.

CHAPTER XII.

CONSTRUCTION LIENS.

§ 275. Mechanic's and other Liens.
276. Statutes affecting this Subject.
277. What is covered by such Lien. Appurtenances.
§ 278. Material furnished.
279. Railway Lien.
280. Miscellaneous Decisions.
281. Landlord's Lien.

§ 275. **Mechanic's and other Liens.** — The property of telegraph, telephone, electric light and railway companies is generally subject to all liens which apply in case of property of private corporations or individuals unless statutory exemption is made. It has been attempted to hold that the property of an electric light corporation is exempt from the application of an ordinary mechanic's lien statute on the same principle on which the property of a municipal corporation is exempted; namely, that the public character of the work carried on by the corporation rendered it unadvisable that this should be interrupted by the sale of a portion or all of the plant under a mechanic's lien statute. The court, however, held that while the electric light corporation was in effect a public corporation, yet it was not to be placed in the same line with municipal corporations, and that while the business which it carried on was public, it was done for the profit and advantage of the stockholders of the company as well as for the advantage and convenience of the public, and therefore that its property should be subject to a mechanic's lien in the same way as the property of any private corporation or individual.[1] Presumably the same ruling would be made in case of telegraph and telephone lines, unless some statute expressly exempts them. As to

[1] Badger Lumber Co. *v.* Marion Water Supply, Electric Light & Power Co., 48 Kan. 182. Cf. *supra*, § 24.

telegraph lines, an indirect decision on this point is a case where a mechanic's lien was claimed by a contractor against a telegraph company, and the court held that the statute giving a mechanic's lien was intended for the benefit of employees only, and not for a contractor who furnishes and strings the wires upon the poles of the company, under a contract.[1] In this case, the court seems to have tacitly assumed that there was no question of the applicability of the statute to telegraph companies.

§ 276. **Statutes affecting this Subject.** — In some States statutes have been passed specifically authorizing mechanic's liens upon the property of telegraph or telephone companies. Thus in Florida it is provided that liens prior in dignity to all others may exist in favor of (among others) any person performing, by himself or other, any labor upon any telegraph or telephone line, whether in the construction, repair, or operation thereof; upon such line, any and all franchises, machinery and equipments connected therewith or thereon, and on the land upon which they stand.[2] Also in favor of any person who shall furnish any building material for the construction, repair, or use of any telegraph line upon said lines or other property and the lands upon which they stand.[3] Also in favor of any person who shall furnish any machine or parts of machine or instrument for any telegraph or telephone line, upon the articles so furnished.[4]

Also in Wisconsin a lien is given as follows: Any person who shall do or perform any labor or services in cutting, felling, hauling, driving, rafting, booming, cribbing, towing, sawing, peeling or manufacturing into lumber any logs or timber in any of the counties of this State, shall have a lien upon such logs, timbers, lumber, cord wood, telegraph poles,

[1] Bankers and Merchants Telegraph Co. of Indiana *v.* Bankers and Merchants Telegraph Co. of New York, 27 Fed. Rep. 536.

[2] Florida Rev. Stat. § 1727. [3] Ib. § 1729.

[4] Ib. § 1737.

telephone poles for the amount due or to become due for such labor or services, which shall take precedence of all other claims or liens thereon.[1]

In most States, however, the application of a mechanic's lien to such property depends upon the ordinary statute creating the usual mechanic's lien, and is regulated by the rules governing such liens in general. It would be outside of the scope of this work to give any discussion of these rules, except as they have been applied to electric companies, which, as yet, has not been the case in many instances. A few points of more or less importance have been decided, which are given in the following sections.

§ 277. **What is covered by such Lien. Appurtenances.** — When the statute gives a lien upon the real estate and its appurtenances, it has been held that the poles and wires of an electric company constitute appurtenances to the power station, and, therefore, are covered by the lien.[2] Thus in one case the poles were planted in the streets in the usual manner, and the wires and lamps were fixed thereon, and all were connected by the electric light wires with the machinery and premises of the company. The language of the statute provided that when a person under contract with the owner of land "shall furnish material for erecting any appurtenance to any building he shall have a lien upon the whole piece or tract of land, the buildings and appurtenance." It was held that the poles and wires were an appurtenance of the premises of the company. In this case the court says, "If the poles and wires can be regarded as an appurtenance of the power house, the plaintiff acquired a lien and is entitled to enforce it against the property of the defendant. Here the principal thing was the power house, and the poles and wires attached thereto were incident to the power house and

[1] Sanb. and Berr. Ann. St. § 3329.

[2] Badger Lumber Co. *v.* Marion Water Supply, Electric Light & Power Co., 48 Kan. 182.

machinery. They were necessary to the enjoyment of the principal thing and indispensable to the transmission of electricity and the lighting of the city. 'If a conveyance of the property of the company with its appurtenances thereto belonging had been made by the defendant, we do not doubt that the poles and wires would have passed as appurtenant to the premises conveyed. The fact that the poles were planted in the streets of the city, the fee of which is in the public, would not change their character or make them any the less an appurtenance of the premises of the electric light company." [1]

§ 278. **Material Furnished.** — In a State where a statute gave a lien for "material furnished about the erection and construction, operation and repairs of a building," the court held that an electric light plant furnished for lighting a vessel was material furnished within the language and intent of the statute.[2]

§ 279. **Railway Lien.** — Under the statutes of Ohio, which

[1] Cf. Fechet *v.* Drake, 12 Pac. Rep. 694; American Union Telegraph Co. *v.* Middleton, 80 N. Y. 408; Boston Safe Deposit & Tr. Co. *v.* Bankers & Merchants Teleg. Co., 36 Fed. Rep. 288; Harriman *v.* Woburn Electric Light Co. 163 Mass. 85; Ramsdell *v.* Citizens' Electric Light & P. Co., 61 N. W. (Mich.) 275; Harrisburg El. Light Co. *v.* Goodman, 129 Pa. St. 206; Vail *v.* Weaver, 132 Pa. St. 363. As throwing light on this point, the decisions on similar points are valuable. Thus it has been held that when electric lighting machinery, *i. e.*, engine and dynamo, is placed in a building used for other purposes, the question as to whether they become part of the realty is a question of intention, *i. e.*, whether they were intended to remain permanently. Vail *v.* Weaver, 132 Pa. St. 363. When electric light wires are placed beneath the plastering of a building, to connect with the lamps, the question of ownership, as between the company and the owner of the building, is a question of the intention of the construction contract. Harrisburg Electric Light Co. *v.* Goodman, 129 Pa. St. 206. Telegraph poles and wires in a highway are realty. American Union Telegraph Co. *v.* Middleton, 80 N. Y. 408. The lamps of an electric light plant are chattels, and should be mortgaged as such. Ramsdell *v.* Citizens' Electric Light & Power Co., 61 N. W. (Mich.) 275.

[2] Mulholland *v.* Thomson-Houston Electric Co., 66 Miss. 339.

give a mechanic's lien for materials furnished for constructing a railroad, depot buildings, and water-tanks, the lien does not apply to electrical apparatus used in putting an electric lighting plant in a hotel not owned by the railroad company although forming a part of the same enterprise.[1]

§ 280. **Miscellaneous Decisions.** — It has been held that where the statute gives a lien to an employee, this statute will not extend to a contractor who has, under contract with the telegraph company, strung wires on poles of the company, and he cannot assert a mechanic's lien upon the property of the company.[2] It has also been held that under the laws of Texas, when a mechanic's lien is registered, it relates back to the time when the work or materials were furnished, and will take precedence of subsequent mortgage liens, although they were recorded prior to the registration of the mechanic's lien, four months being allowed for the registration of the latter lien.[3] It has also been held in New York that although the statute relating to mechanic's liens provides simply that persons who have filed notice of lien as well as those having subsequent liens and claims by judgment, mortgage or conveyance, shall be made parties to an action to foreclose a mechanic's lien, yet this enumeration of parties who must be joined in the action does not prohibit making others parties under the section of the Code which provides that all parties necessary to the determining of a controversy may be brought in. In this case the plaintiffs, having agreed to furnish to the defendant an engine and other fixtures, contracted with a third person to furnish the engine. When the same was furnished, the plaintiffs gave such third person an order on the defendant which the defendant refused to accept. The plaintiffs thereupon noti-

[1] Industrial & Mining Guaranty Co. *v.* Electric Supply Co., 58 Fed. Rep. 739.

[2] Bankers & Merchants Telegraph Co. of Indiana *v.* Bankers & Merchants Telegraph Co. of New York, 27 Fed. Rep. 536.

[3] Keating Impl. & Mach. Co. *v.* Marshall Elec. L. & P. Co., 74 Tex. 605.

fied the defendant that the order was revoked, but the payee of the order notified the defendant that he would hold the defendant responsible upon the order. Thereafter the plaintiffs filed a mechanic's lien and sought to foreclose it against the defendant, and the defendant moved that the payee in the order should be joined with or substituted in place of the defendant in the foreclosure suit, and the court held that the payee in the order should be joined in the suit.[1]

§ 281. **Landlord's Lien.** — In Iowa a statute provides that a landlord shall have a lien upon any personalty of the tenant used on the premises during the terms, and this lien is not extinguished by the removal of the property from the premises. It was held, therefore, that a landlord could not enjoin an electric light company which had leased and was occupying his land for a term of years under a written lease, from moving before the end of the lease to other premises in the city on which the company intended to continue and enlarge its business, the company not being, at the time of removal, in arrears for rent, and its personalty being easily identified. These facts showed that the landlord had not, at the time of the removal, any existing lien for his rent, nor would he be deprived of the benefit of his lien by the removal in case rent should become overdue in the future, during the term of the lease.[2]

[1] Williams *v.* Edison Electric Illuminating Co., 16 N. Y. S. 857.

[2] Carson *v.* Electric Light & Power Co., 85 Ia. 44.

BOOK III.

OPERATION.

CHAPTER XIII.

OPERATION OF ELECTRIC COMPANIES.

§ 282. General View.
283. Statutes.
§ 284. Grouping of Electric Companies.

§ 282. **General View.** — In considering the rules of law governing the operations of electric companies in the prosecution of their business, the main characteristic from which most of such rules as are peculiar to these companies spring, is the public nature of the business in which the companies are engaged. The character of this business has been already commented upon in previous sections,[1] and the privileges incident thereto in the way of acquisition of franchises over highways have been heretofore discussed.[2] From this public character of the business arises the principle that in its prosecution, electric companies are bound to serve the public with due care and diligence. This, as will be seen later, is the guiding principle of all the numerous decisions affecting this subject, and the basis of the numerous statutes regulating this matter.

§ 283. **Statutes.** — By reason of the importance to the public that electric companies should exercise their privileges and carry on their business in accordance with the above principles, in many States statutes have been passed

[1] *Supra*, §§ 4–6, 18.

[2] *Supra*, cc. iv., v., vi.

which either express, in definite terms and with limitations, the common-law duties arising from the nature of the employment, or prescribe additional duties, or grant privileges and exemptions which do not exist at common law. For instance, as will be seen fully hereafter, in very many States statutes have been passed compelling telegraph companies to receive messages from and furnish telegraphic facilities to every one alike, without unjust discrimination, *i. e.*, against rival companies, and to transmit and deliver messages with care and promptness; and these statutes have, in some cases, been extended also to telephone companies for the same reasons which caused the enactment of the telegraph acts. So, again, in many cases, an order of transmission of telegrams is prescribed by statute, and a preference is given to messages which the United States government or the State government may find occasion to send over the telegraph lines, including messages in furtherance of justice, and the punishment of crime, and to messages of public and general interest, leaving other messages to be forwarded in order of receipt. The duties of a telegraph company in receiving, transmitting, and delivering messages promptly and correctly are generally enforceable by common-law actions which may be brought by the person interested, as will be seen hereafter; but in some States this common-law right of action is reinforced or supplemented by statutes prescribing a penalty for dereliction on the part of the telegraph company in the performance of its duties. There are also statutes which require telegraph operators to preserve the secrecy of despatches inviolate, and others which prevent outsiders from intercepting messages or otherwise interfering with the operation of the lines. There are also statutes exempting from jury duty the employees of a telegraph company on account of the inconvenience and trouble which their absence from their official duties would be likely to cause, and other statutes of less importance,

such as those which provide for the safety and protection of the motormen of electric railway cars in inclement weather, which regulate the length of the hours which electric employees may be required to work, and other similar matters. The statutes and the decisions relating to the operations of electric companies will be discussed in the following chapters.

§ 284. **Grouping of Electric Companies.** — In the discussion of the operations of the various electric companies, it will be necessary to consider them, in most cases, separately, as the methods of operation of the companies are radically distinct. The telegraph, which is one of the oldest of the companies, and whose operations have been regulated by numerous statutes and have formed the subject of very numerous decisions, confines its operations to the transmission of messages which it receives in writing and delivers in writing. The telephone, while, like the telegraph, it is a means of communicating intelligence by electricity, employs a wholly different method for this communication, and, generally, establishes lines with terminal instruments over which those desiring may talk, and thus communicate intelligence orally. These two classes of companies, however, having a very strong resemblance, may in some cases be discussed together, as will be seen hereafter. The operations of electric light companies, so far as they are peculiarly characteristic of such companies as distinguished from ordinary manufacturing companies, will be discussed by themselves. The electric railway company, again, is wholly distinct in its purpose and methods of operation from either the telegraph, telephone or electric light, and therefore the rules which govern this matter are so distinct in character as to require separate treatment.

CHAPTER XIV.

PROHIBITION OF UNJUST DISCRIMINATION.

§ 285. Discrimination of Telegraph Companies.
286. Discrimination against other Telegraph Lines.
287. Messages from other Telegraph Lines.
288. Parallel and competing Lines.
289. Same (*continued*).
290. Reasonable Regulations.
291. Limitations of the Discrimination Rule.
292. Furnishing Market Reports.
293. Reports to Bucket Shops.
294. Board of Trade or Stock Exchange Reports.
295. Discrimination by Telephone Companies.
296. Special Acts as to Telephone Companies, Arkansas.
297. Statute, Connecticut.
298. Statute, Indiana.
299. Constitution, Kentucky.
300. Statute, Maine.
§ 301. Statute, Maryland.
302. Statute, Massachusetts.
303. Statute, Michigan.
304. Statute, Tennessee.
305. Statute, Vermont.
306. Statute, Wisconsin.
307. Refusal of Telephones to Telegraph Companies.
308. United States Letters Patent no Defence to Discrimination.
309. Same Subject.
310. Same Subject (*continued*).
311. Same Subject (*continued*).
312. Same Subject (*continued*).
313. Same Subject (*continued*).
314. Telephones for Individuals.
315. Statutory Telephone Rates.
316. Indiana Cases.
317. Same Subject (*continued*).
318. Same Subject (*continued*).
319. Discrimination of Electric Light and Railway Companies.

§ 285. **Discrimination of Telegraph Companies.** — While the duty of telegraph companies to serve all the public alike exists at common law and arises from the public nature of the employment of the company,[1] yet in many States this duty has been declared or enacted by express statute. A usual form is that which is found in New York, and which is expressed as follows. "Every (Telegraph) corporation shall receive despatches from and for other telegraph and telephone lines or corporations, and from or for any individuals, and on payment of the usual charges by individuals for transmitting despatches, as established by the rules and

[1] *Supra*, § 6; *infra*, § 377.

regulations of such corporations, transmit the same with impartiality and good faith, and in the order with which they are received.[1] Statutes similar to this in effect, though varying in language, are found in almost all the United States.[2]

§ 286. **Discrimination against other Telegraph Lines.** — One important purpose of these statutes in addition to securing to individuals the speedy transmission of their messages, was to build up the system of connecting telegraph lines so that messages could be sent over long distances by transmission from one line to another, and to avoid the possibility of rival companies refusing to receive each other's messages for transmission, thereby preventing the extension of telegraphic facilities, and it was for this purpose that the legislatures expressly incorporated in the statutes, in most instances, "other telegraph companies" as among the parties to whom telegraphic service must be offered on equal terms. There does not seem to have been much disposition to evade this provision on the part of telegraph companies, and generally it is for their advantage to afford telegraphic facilities for the transmission of messages for other companies, thereby increasing the volume of business and affording the public such ample accommodations as still further tend to the growth of telegraphy.

[1] Acts 1890, ch. 566, Art. 103.

[2] Arkansas, Acts 1885, ch. 107, §§ 7, 8, 10; Colorado, Mill's Ann. Stat. § 589; Connecticut, Gen. Stats. § 3952; Georgia, Laws 1889, No. 672, § 2, Laws 1887, No. 365, § 1, Laws 1892, No. 93; Illinois, Ann. Stat. ch. 134, par. 6; Indiana, Ann. Stat. § 5511, as amended by Act 1885, ch. 48; Iowa, Ann. Code, § 2106; Kentucky, Const. § 199; Maryland, Pub. Gen. Laws, Art. 23, § 228; Massachusetts, Pub. Stat. ch. 109, §§ 10, 11; Michigan, Acts 1893, No. 195; Mississippi, Ann. Code, § 4326; Missouri, Rev. Stat. § 2725; Nebraska, Comp. Stat. ch. 89a, §§ 5, 9, 11; New Hampshire, Pub. Stats. ch. 81, § 13; New York, Acts 1890, ch. 566, Art. 103; Ohio, Rev. Stat. § 3462; Pennsylvania, Bright Purd. Dig. p. 1629, § 11; Tennessee, Code, § 1929; Vermont, Rev. Laws, § 3660; Virginia, Code, § 1291; Washington, Hill's Stats. & Codes, § 1550. See also statutes as to operation in §§ 320–349.

§ 287. **Messages from other Telegraph Lines.** — In a few cases, however, arising between companies whose lines covered the same field, either wholly or partially, there have been refusals by one company to accept and transmit messages for another, and in such cases the company whose message has been refused, by due application to the court, may obtain either an injunction restraining the offending company from refusing to receive and transmit the messages, or damages or penalty for refusal to transmit any particular message, as the statutes may provide.[1]

§ 288. **Parallel and Competing Lines.** — In New York an exception was at one time made which allowed telegraph companies to refuse to receive messages from companies which have parallel and competing lines. In such a case the company which refused to receive the message was obliged, in defence of its action, to show that the company offering the message had a parallel and competing line.[2]

Thus in a case in New York[3] the plaintiff company brought suit for a penalty of $100 from the defendant, under the State statute, for refusing to receive a message and transmit the same to Auburn, N. Y. The defendant company maintained that it was not obliged so to do under the statute, because the plaintiff company had a parallel and competing line to the same place. The facts showed that the defendant company had a line from Albany to Buffalo in a direct line. It also had, between Syracuse and Rochester, a southern line, a loop of the northern line, which passed through Auburn, and that messages were sometimes sent to Buffalo

[1] Atlantic & Pacific Telegraph Co. *v.* Western Union Telegraph Co., 4 Daly (N. Y.), 527; United States Telegraph Co. *v.* Western Union Telegraph Co., 56 Barb. (N. Y.) 46.

[2] United States Telegraph Co. *v.* Western Union Telegraph Co., 56 Barb. (N. Y.) 46; Atlantic & Pacific Telegraph Co. *v.* Western Union Telegraph Co., 4 Daly (N. Y.), 527.

[3] United States Telegraph Co. *v.* Western Union Telegraph Co., 56 Barb. (N. Y.) 46.

over this line, though it was more ordinarily used for local messages. Plaintiff company had a line from Albany to Buffalo corresponding to the northern line of the defendant company, but it had no line to Auburn corresponding to the loop, and the nearest it came to Auburn was the city of Syracuse, eight miles off. The message was delivered to the plaintiff company by the sender in Albany, N. Y., and transmitted by it over its line to Syracuse. There it was taken by the operator of the plaintiff company and carried to the office of the defendant company and written on one of their blanks and handed to the operator of the defendant company with the request to forward it to Auburn. This the operator refused to do. The court held that the true test governing this case was the question whether the plaintiff company had a parallel and competing line from the point where the message was offered for transmission to the point of destination, and that other arrangements of the lines of either plaintiff or defendant were immaterial; that in the case at bar there was no pretence that the plaintiff company had a parallel and competing line from Syracuse, where the message was offered, to Auburn, its destination, and therefore the defendant company should have received it. The court also held that the plaintiff was the proper person to sue for the penalty, although it was acting as the agent of the sender.

§ 289. **Parallel and Competing Lines** (*continued*).—In another case,[1] the Atlantic Telegraph Co. brought suit in New York for an injunction against the Western Union Telegraph Co. to prevent the latter from refusing to accept messages for transmission over its Atlantic cable, relying upon the statute in that State which required telegraph companies to receive and transmit messages for other telegraph companies. The Atlantic company had lines running from New York to

[1] Atlantic & Pacific Telegraph Co. *v.* Western Union Telegraph Co., 4 Daly (N. Y.), 527.

Buffalo, and lines from there to San Francisco. The Western Union, also, had parallel lines to the same places, and was doing business in competition with the Atlantic Company. The defendant contended that it was excused from taking the messages in question on account of the exception in the statute above stated, which relieved one company from receiving messages from another company which had parallel lines and was working in competition with it. The court, however, held that the exception in the statute applied only to the line over which the message was to be sent, and as the plaintiff company applied in New York to have the message sent from New York to Plaister Cove, in Nova Scotia, to which point messages were sent for transmission to Europe, and had no competing line over this route, the fact that it had competing lines to other places did not affect the case.[1]

§ 290. **Reasonable Regulations.** — A telegraph company may, however, in receiving messages from other telegraph companies, make reasonable rules as to the reception of such messages for transmission, as, for instance, that the sending company must write on the message the date and the name of the company sending it; but a rule that the sending company must produce a power of attorney from the original sender of the message, authorizing the company to transmit it over the connecting company's lines, is unreasonable and impracticable, and simply calculated to keep other companies from doing business over the lines, and therefore will be held void.[2]

§ 291. **Limitations of the Discrimination Rule.** — Although a telegraph company is obliged to extend its telegraph facilities to all persons alike, yet this rule applies only to

[1] For a peculiar instance of alleged discrimination, see Mayo *v.* Western Union Telegraph Co., 112 N. C. 343.

[2] Atlantic & Pacific Telegraph Co. *v.* Western Union Telegraph Co., 4 Daly (N. Y.), 527.

telegraphic business of kinds for the transaction of which the company holds itself out to the public, and it cannot be compelled to undertake kinds of business which it does not consider for the interests of its stockholders. Thus a telegraph company, whose ordinary business is the conducting of a general telegraphic business, may or may not engage in the business of supplying market reports or stock reports to brokers, or any other special class of business; but it cannot be required to engage in such other and special branches of business in the absence of statutory requirements or charter stipulations compelling it so to do.[1] Moreover, only unjust discrimination is prohibited. Therefore, if a telegraph company makes different prices to two different newspaper companies, this discrimination is not unlawful if the conditions of expense and difficulty vary, so as to make the difference in price reasonable.[2]

§ 292. **Furnishing Market Reports.** — Whether or not the rule as to discrimination applies to business done by telegraph companies outside of their regular telegraphic business, is not well settled by the decisions. It has been held that if the telegraph company engages in the business of supplying market reports to brokers and others interested therein, it must supply the reports to all alike, and cannot, merely for its own convenience or the advantage of its business, supply to some and refuse to supply to others. This point has been discussed in two cases in New York, the first being Shepard *v.* Gold & Stock Telegraph Co.,[3] in which the facts were as follows: —

[1] Smith *v.* Gold & Stock Telegraph Co., 42 Hun (N. Y.), 454; Bradley *v.* Western Union Telegraph Co., 17 Fed. Rep. 834; Metropolitan Grain & Stock Exchange *v.* Board of Trade, 15 Fed. Rep. 850. Compare *post*, § 307, and see *post*, §§ 292–294; Shepard *v.* Gold & Stock Telegraph Co., 38 Hun (N. Y.), 338.

[2] Western Union Telegraph Co. *v.* Call Publishing Co., 62 N. W. Rep. 506.

[3] 38 Hun (N. Y.), 338.

The telegraph company, which was in the business of reporting to various brokers the market prices of stocks and bonds, had an instrument in the plaintiff's office for this purpose, but attempted to take it out because he forwarded the reports to other brokers, thus interfering with the business of the telegraph company. He brought suit for an injunction to prevent this removal. In the contract under which he hired the instrument, the telegraph company stipulated that the reports were forwarded to subscribers for their private use in their own business exclusively, and that the subscribers should not sell or give up the copies of the reports in whole or in part, nor permit any outside party to copy them, and that subscriptions by one party for the benefit of himself and others at their joint expense would not be allowed. The contract also provided an unqualified right in the telegraph company to discontinue these reports and remove the instruments, without notice, when they were used in any way which it considered detrimental to its interests. It was proved that the plaintiff had regularly sent the information thus obtained to another firm. He excused this action on the ground that he was financially interested in the firm; but the court held that this was not a valid excuse, as in that way, the plaintiff, if diligent, might absorb a great portion of the business of the defendant, and therefore that the stipulations of its contract were reasonable, and bound the parties.

In a later case, however,[1] the facts were almost the same as in Shepard's case; but the court came to directly the opposite conclusion, that the telegraph company, being in a public business, must supply equal facilities to all, and that although it might wholly withdraw from the business of furnishing stock reports, yet if it continued in it as to one, it must as to all, and, further, that the stipulation in the contract that it might terminate the same whenever, *in its*

[1] Smith *v.* Gold & Stock Telegraph Co., 42 Hun (N. Y.), 454.

judgment, the conditions were broken, was unreasonable and void. There does not appear to have been any proof in this case that the plaintiff was sharing the information he received with other parties. The court in this case notices the difference between ordinary telegraphic business and the business of supplying market reports, but holds that in both, the telegraph company is bound by its public duty not to discriminate. Contrary to the rule in this case, however, the court in Ohio has held that as to such special business as furnishing market reports, the telegraph company was not under obligations as to the public, and might furnish or refuse to furnish to whomever it would.[1] And a case in Pennsylvania follows this line also.[2] The distinction drawn in this case, and in another in the same State,[3] is probably the true one, *i. e.*, that where the charter purposes of the corporation include collecting and furnishing market quotations and other news, or similar purposes, the company may be compelled to perform its charter duty to all without discrimination;[4] but where the charter purpose is that of receiving, transmitting, and delivering messages only, the furnishing of stock quotations and market news is *ultra vires*, and the courts will not enforce its performance.[5]

§ 293. **Reports to Bucket Shops.** — The telegraph company is not, however, bound to furnish such facilities to brokers engaged in mere gambling transactions, as this is an immoral or illegal transaction, and the law will not compel the telegraph company to furnish information to further such transactions.[6] In the case in the Federal Court the

[1] Bradley *v.* Western Union Telegraph Co. (Cinn. Com. Gazette), 17 Fed. Rep. 834.

[2] Sterrett *v.* Philadelphia Local Telegraph Co., 18 Week. N. of Cas. 77.

[3] Davis *v.* Elect. Reporting Co., 19 Week. N. of Cas. 567.

[4] Ibid.

[5] Sterrett *v.* Philadelphia Local Telegraph Co., *supra*. Cf. Cain *v.* Western Union Telegraph Co., 18 Cinn. Week. L. Bull. 267.

[6] Smith *v.* Western Union Telegraph Co., 84 Ky. 664; Bryant *v.* Western Union Telegraph Co., 17 Fed. Rep. 825.

illegal transaction consisted in buying and selling futures in grain and produce upon margins, the complainants carrying on this business and never dealing in purchases or sales for present delivery, but only on margin, and the customer not being held personally liable, but only to the extent of his margin, the transaction being closed out if the margin was lost, and on the other hand, if the market went in his favor, the customer being able to call for a settlement at any time without regard to the maturity of his contract, and he then being paid the difference between the then market price and the price at which he bought or sold, less the commission. The court held that this was a very pernicious and demoralizing species of gambling, and that a court of equity would not compel the telegraph company to furnish quotations of prices for carrying on such business.[1]

§ 294. **Board of Trade or Stock Exchange Reports.** — Trouble has arisen in several cases because the boards of trade or stock exchanges have refused to allow the telegraph companies to have the reports of their transactions for transmission. There is a conflict of opinion upon the question whether a board of trade or stock exchange is or is not so far a public corporation that it must furnish its reports to the public without unreasonable or unjust discrimination. It has been held that it must. Thus where the Board of Trade refused to allow a telegraph company to take its reports for transmission because it sent them to persons who paid nothing to the support of the board, *i. e.*, bucket shops, the court held that this was unjust discrimination; that the Board of Trade was so far affected with a public interest, that it must not discriminate as to who should receive market quotations from the telegraph companies, or what telegraph companies should be allowed facilities for dis-

[1] But see Sterrett *v.* Philadelphia Local Telegraph Co., 18 Week. N. of Cas. 77. Compare *post*, § 352.

tributing the information to the public.[1] On the other hand, it has been held that the Board of Trade is wholly a private corporation, and can give or withhold such information as it sees fit, as to the transactions within its halls.[2]

§ 295. **Discrimination by Telephone Companies.** — A telephone company being, as has been seen in an earlier part of this work,[3] engaged in a species of telegraphy, and this occupation being of a public nature similar to that of telegraph companies, it has been deemed best by the State legislatures in many instances to enact statutes providing against discrimination by telephone companies in the furnishing of telephonic facilities, covering in some cases merely the leasing of telephones, and connecting them with the central exchange and other subscribers, and in other cases including also in addition the transmission of oral messages in the same manner as telegraph companies transmit written ones. These statutes originated in an attempt, which will be discussed later, on the part of the parent American Bell Telephone Company, of Massachusetts, to prevent any telegraph companies except the Western Union from employing the telephone exchanges in connection with the telegraphic business, the Bell Company being obliged to do this by a fundamental working contract between itself and the Western Union Telegraph Company. The statutes which affect this prevention of discrimination in the case of telephones may be divided into two classes. First, those which merely include telephone companies in the statutes preventing discrimination by telegraph companies. This is the case in Arkansas,[4]

[1] Public Grain & Stock Exchange *v.* Western Union Telegraph Co., C. C. Cook County, May 1883, 17 Fed. Rep. 830; New York & Chicago Grain & Stock Exchange *v.* Board of Trade, 19 N. E. Rep. 855.

[2] Metropolitan Grain & Stock Exchange *v.* Board of Trade, 15 Fed. Rep. 850; Marine Grain & Stock Exchange *v.* Western Union Telegraph Co., 22 Fed. Rep. 23.

[3] *Supra*, § 13.

[4] Acts 1885, ch. 107, §§ 5-10, supplemented by special act, see next section.

Connecticut,[1] Mississippi,[2] Missouri,[3] New Hampshire,[4] New York,[5] Ohio,[6] Virginia,[7] Washington.[8]

§ 296. **Special Acts as to Telephone Companies, Arkansas.** — In other States, however, special acts are passed which regulate with more particularity the duties of telephone companies as to furnishing instruments to all would-be subscribers. Thus it is provided by statute in Arkansas that every telephone company doing business in that State and engaged in the general telephone business must supply all applicants for telephone connection and facilities without discrimination or partiality, provided such applicants comply or offer to comply with the reasonable regulations of the company, and all conditions or restrictions must be imposed impartially upon all persons or companies in like situations, and no discrimination shall be made against any individual or company engaged in lawful business by requiring as condition for furnishing such facilities that they shall not be used in the business of the applicant or otherwise, under penalty of one hundred dollars for each day of discrimination and refusal.[9]

§ 297. **Statute, Connecticut.** — In this State by statute, any person or corporation owning, controlling, or operating a telephone exchange or service in the State must, upon application of any telegraph company, furnish the telegraph company so applying with the use of a telephone or telephones, and telephone service, and connection with their respective exchanges, the subscribers thereto and telephone service, without discrimination between telegraph companies as to such connection, service, or use of instruments furnished or charges therefor for the same class of service, and

[1] Gen. Stats. § 3952, supplemented by special act, see next section.
[2] Annot. Code, § 4326.
[3] Rev. Stat. § 2725.
[4] Pub. Stats. ch. 81, § 13.
[5] Acts 1890, ch. 566, Art. 103.
[6] Rev. Stats. §§ 3462, 3471.
[7] Code, §§ 1291, 1292.
[8] Hill's Stats. & Codes, § 1550.
[9] Acts 1885, ch. 107, § 11.

any court in that State having equity jurisdiction shall upon the petition of any party in interest enforce the provisions of that act by any suitable process or decree in equity.[1]

§ 298. **Statute, Indiana.** — In this State, by statute, every telephone company with lines wholly or partially in the State, and engaged in a general telephone business, shall, within the local limits of such telephone company's business supply all applicants for telephone connections and facilities with such connections and facilities without discrimination or partiality, provided such applicants comply or offer to comply with the reasonable regulations of the company, and no such company shall impose any conditions or restrictions upon any such applicant that are not imposed impartially upon all persons and companies in like situations, nor shall such companies discriminate against any individual or person engaged in any lawful business or between individuals or companies engaged in the same business, by requiring as a condition for furnishing such facilities that they shall not be used in the business of the applicant or otherwise for any lawful purpose.[2]

Any person or company violating the provisions of this act shall be liable to any party aggrieved in a penalty of one hundred dollars for each offence, to be recovered in a civil action in any court of competent jurisdiction, provided nothing in this act shall be construed to take away or abridge the right of such aggrieved party to appeal to a court of equity to prevent such violations or discriminations by injunction or otherwise.[3]

§ 299. **Constitution, Kentucky.** — In Kentucky by the Constitution, telephone companies operating exchanges in different towns or cities or other public stations, shall receive and transmit each other's messages without unreasonable delay or discrimination.[4]

[1] Conn. Stats. 1889, ch. 160.
[2] Ann. Stats. § 5529.
[3] Ib. § 5529, R.
[4] Const. § 199.

§ 300. **Statute, Maine.** — In this State the statutes provide that every corporation operating a telephone line in this State shall, upon the application of any other corporation operating a telephone line, allow the corporation first making such application, connection between such lines upon the same rates as charged for the same distance upon the lines of the corporation so connecting, and with the same charges for the use of telephone exchanges as are established for the patrons of such corporations. Every corporation authorized by its charter to grant telephone privileges, including the leasing of instruments and other appliances, shall grant such privileges upon equal and uniform terms and conditions.[1]

§ 301. **Statute, Maryland.** — Every telephone company with wires wholly or partly within this State, and engaged in general telephone business, shall, within the limits of such telephone company's business, supply all applicants for telephone connections and facilities for such connections and facilities, without discrimination or partiality; provided such applicant comply or offer to comply with the reasonable regulations of the company; and no such company shall impose any conditions or restrictions upon such applicant that are not imposed impartially upon all persons or companies in like situation, nor shall such companies discriminate against any individual or company engaged in any lawful business, or between individuals or companies engaged in the same business, by requiring, as a condition for furnishing such facilities, that they shall not be used in the business of the applicant, or otherwise for any lawful purpose.[2]

§ 302. **Statute, Massachusetts.** — Any person or corporation owning, controlling, or operating a telephone exchange or service in this Commonwealth shall, on application of any telegraph company, furnish the telegraph company so applying with the use of a telephone or telephones and a telephone service, and connection with their respective exchanges, the

[1] Acts 1885, ch. 378, § 9.

[2] Laws 1892, ch. 387.

subscribers thereto and telephone service, without discrimination between telegraph companies as to such connection, service, or use of instruments furnished or charges therefor for the same class of service.[1]

Any person or corporation owning, controlling, or operating a telephone exchange or service in this Commonwealth shall, on application of any individual or corporation, and the tender of the charges or rental sum usual or customary for the class of service required, without discrimination for the same class of service rendered, furnish such individual or corporation so applying with the use of a telephone and telephone service and connection with their respective exchanges and the subscribers thereto, provided that the individual or corporation so applying will secure the rights necessary to make the connections applied for and pay to the telephone company in advance a sufficient sum to cover the actual cost of the extension, if said extension is beyond one mile from any main exchange circuit of the said telephone company applied to.[2]

Any court in the Commonwealth having equity jurisdiction shall, upon petition of any party in interest, enforce the provisions of this act by any suitable process or decree in equity.[3]

§ 303. **Statute, Michigan.** — It is the duty of every telephone company or person, firm or corporation engaged in the business of leasing telephones to the public, or supplying the public with telephones and telephonic service, or operating a telephone exchange, to receive and transmit, without discrimination, messages from and for any other company, person, or persons upon payment or tender of the usual or customary charges therefor; and upon payment or tender of the usual or customary charges, or usual or customary rental sum, it shall be the duty of every telephone

[1] Acts 1885, ch. 267, § 1.
[2] Ib. § 2.
[3] Ib. § 3.

company, or person or persons, firm or corporation engaged in the business of leasing telephones to the public, or supplying the public with telephones and telephonic service, or operating a telephone exchange, to furnish without unreasonable delay, without discrimination, and without any further or additional charge, to the person, firm, or corporation applying for the same, including all telegraph companies, a telephone or telephones, with all the proper or necessary wires or fixtures, and the use of such telephone, wires and fixtures, as well as connection with the central office or telephone exchange, if desired, and shall connect the telephone of such person, firm, or corporation with the telephone of any other person, firm, or corporation having connection with the same, or a connecting exchange or central office, whenever requested so to do, without regard to the character of the message to be transmitted, provided it is not obscene or profane; and every company, person, firm, or corporation neglecting or refusing to comply with any of the provisions of this act shall forfeit all right to transact a telephone business in this State, and may be enjoined therefrom, and from leasing telephones to the public, from supplying the public with telephones and telephonic service, and from operating a telephone exchange, by bill of complaint filed in any court of competent jurisdiction, by any person, firm, or corporation injured, interested in, or denied any of the rights herein given; or such person, firm or corporation, neglecting or refusing to comply with any of the provisions of this act shall forfeit not less than twenty-five nor more than one hundred dollars for each and every day such neglect or refusal shall continue, one-half to the use of the person, firm, or corporation prosecuting therefor.[1]

§ 304. Statute, Tennessee. — Every telephone company doing business within this State, and engaged in a general telephone business, shall supply all applicants for telephone

[1] Howell's Ann. Stat. Supp., 1883–1890, § 3718 i.

connections and facilities without discrimination or partiality, provided such applicants comply or offer to comply with the reasonable regulations of the company; and no such company shall impose any condition or restriction upon any such applicant that is not imposed impartially upon all persons or companies in like situations, nor shall such company discriminate against any individual or company engaged in lawful business by requiring, as condition for furnishing such facilities, that they shall not be used in the business of the applicant or otherwise, under penalty of one hundred dollars for each day such company continues such discrimination, and refuses such facilities, after compliance or offer to comply with the reasonable regulations, and time to furnish the same has elapsed, to be recovered by the applicant whose application is so neglected or refused.[1]

§ 305. **Statute, Vermont.** — The statute in this State is the same as the statute in Massachusetts,[2] except that it includes other telephone companies as well, among the parties to whom telephone connections must be furnished, and also provides that any individual in hiring or leasing any telephone shall have the right to transmit by telephone, to any telegraph company using a telephone, any message or telegram to be forwarded by telegraph, and also the right to receive from said telegraph company, over said telephone wires, any message received by telegraph for said individual.[3]

§ 306. **Statute, Wisconsin.** — It shall be the duty of every telephone company or person, firm or corporation engaged in the business of leasing telephones to the public, or supplying the public with telephones and telephone service, or operating a telephone exchange, to receive and transmit, without discrimination, messages from and for any other company, person or persons, upon tender of payment of the usual or

[1] Code, Supplement, Shannon, p. 136, § 11.

[2] See *supra*, § 302.

[3] Laws 1888, No. 124; Laws 1892, No. 73.

customary charges therefor; and upon payment of the usual or customary charges therefor, or usual or customary sum, it shall be the duty of every telephone company or person, firm or corporation engaged in the business of leasing telephones to the public, or supplying the public with telephones or telephone service, or operating a telephone exchange, to furnish, without unreasonable delay, without discrimination, and without any further or additional charge to the person, firm, or corporation applying for the same, including all telegraph companies or other telephone companies, a telephone or telephones, with all the proper or necessary fixtures, as well as connection with the central office or telephone exchange, if desired, and shall connect the telephone of such person, firm, or corporation, with the telephone of any other person, firm, or corporation having a connection with the same, or a connecting exchange or central office, whenever requested so to do, without regard to the character of the messages to be transmitted, provided they are not obscene or profane; and every person or corporation neglecting or refusing to comply with any of the provisions of this act shall forfeit not less than twenty-five nor more than one hundred dollars for each and every day such neglect or refusal shall continue, one-half to the use of the person or corporation prosecuting therefor.[1]

§ 307. **Refusal of Telephones to Telegraph Companies.** — The origin of the statutes above cited was as follows: The parent American Bell Telephone Company, a corporation organized under the laws of the State of Massachusetts, was at an early date in its history obliged, on account of certain complications in its patent affairs, to form a business arrangement with the Western Union Telegraph Company. This arrangement contemplated a monopoly by the Western Union Telegraph Company of the use of the telephone service as an adjunct to telegraphy, and stipulated that the telephone

[1] Laws of 1893, c. 236.

company should not license its instruments to be so used by any other telegraph company. In accordance with this arrangement, the parent Bell Telephone Company, in licensing its local companies, has inserted in the license contract a clause prohibiting the supplying of telephones to telegraph companies for use in their business, or allowing them to become subscribers to the telephone exchanges for this purpose. The local telephone companies, acting under this license contract with the parent American Bell Telephone Company, and in accordance with its requirements, have in many instances refused to supply telephone facilities to other telegraph companies than the Western Union Telegraph Company, and this refusal has brought the matter into court. The local companies contended that they were bound by their licenses to act in this manner, and would forfeit them by a breach of their agreements. The courts have, however, with one exception held that the local telephone companies, being engaged in a public occupation, are obliged to furnish equal facilities to all; that although telephone companies cannot be compelled to add certain branches to their busines, yet if they voluntarily add such branches, *i. e.*, the supplying of telephones for telegraphic purposes, to one telegraph company, they must supply them on the same terms to all telegraph companies, and the fact that their license from the parent company prohibits them from so doing is no defence.[1]

[1] Chesapeake & Potomac Telephone Co. *v.* Baltimore & Ohio Telegraph Co., 66 Md. 399; State *ex rel.* American Union Telegraph Co. *v.* Bell Telephone Co., 36 Oh. St. 296; Commercial Union Telegraph Co. *v.* New England Telephone & Telegraph Co., 61 Vt. 241; State of Missouri *ex rel.* Baltimore & Ohio Telegraph Co. *v.* Bell Telephone Co., 23 Fed. Rep. 539; State *ex rel.* Postal Telegraph Cable Co. *v.* Delaware & Atlantic Telegraph & Telephone Co., 47 Fed. Rep. 633; s. c. *sub nom.* Delaware & Atlantic Telegraph & Telephone Co. *v.* State of Delaware, 50 Fed. Rep. 677; Bell Telephone Co. *v.* Pennsylvania, 7 East. Rep. 672; People *ex rel.* Postal Telegraph Cable Co. *v.* Hudson River Telephone Co., 19 Abb. N. C. 466. Compare *supra*, §§ 291–294.

§ 308. **United States Letters Patent no Defence to Discrimination.** — In the above cited cases the telephone companies, as a portion of their defence, alleged that by virtue of the letters patent of the United States and the federal laws relating thereto, a monopoly was granted to them which State laws could not interfere with or control. The courts, however, while recognizing the validity of this monopoly, held that State laws might impose any reasonable restriction upon the use of articles made and put in use under the letters patent, and that these letters did not authorize the patentee nor its licensees to use the patented articles in any way contrary to the laws of the State.[1]

§ 309. **Same Subject. Chesapeake & Potomac Telephone Company v. Baltimore & Ohio Telegraph Company.** — This case, which gives a full discussion of the obligation to furnish telephones to all telegraph companies alike was an application by the Baltimore & Ohio Telegraph Company for a *mandamus* to compel the telephone company to provide it with instruments. Both corporations were organized under the telegraph incorporation law, but the Chesapeake & Potomac Telephone Company was doing a general telephone business. The application for the writ was based on a State statute requiring telegraph companies to "receive despatches from and for other telegraph lines, associations, and companies," and to "transmit such despatches in the manner established by the rules and regulations of such telegraph lines, and in the order in which they are received, with impartiality and good faith" under a penalty of one hundred dollars. The court held that a telephone is a species of telegraph, and therefore the above statute applied to the

[1] Chesapeake & Potomac Telephone Co. *v.* Baltimore & Ohio Telegraph Co., 66 Md. 399; State *ex rel.* American Union Telegraph Co. *v.* Bell Telephone Co., 36 Oh. St. 296; Commercial Union Telegraph Co. *v.* New England Telephone & Telegraph Co., 61 Vt. 241; State *ex rel.* Postal Telegraph Cable Co. *v.* Delaware & Atlantic Telegraph & Telephone Co., 47 Fed. Rep. 633; Munn *v.* Illinois, 94 U. S. 113.

telephone company. The agreed facts showed that all the instruments of the telephone company were the property of the American Bell Telephone Company of Massachusetts, and leased to the local company. It was admitted that the offices of the Western Union Telegraph Company were connected with the telephone exchange, and this connection was used in sending and receiving messages over the telegraph lines of the Western Union Company. The application of the Baltimore & Ohio Telegraph Company for similar facilities had been refused, unless under certain conditions and restrictions which were not imposed on the Western Union Telegraph Company. It was shown that the parent Bell Telephone Company was under certain obligations to the Western Union Telegraph Company by contract stipulations, whereby it was provided that the telephone lines should not be used for the transmission of general business messages, market quotations, or news for sale or publication "in competition with the business of the Western Union Telegraph Company," and that the parent telephone company "so far as it lawfully and properly can prevent it, will not permit the transmission of such general business messages, market quotations, or news, for sale or publication," over the telephone lines, nor license the use of its telephones or patents for that species of business in competition with such telegraph business of the Western Union Telegraph Company. It was also shown that the license contract under which the local telephone company was operating, contained restrictive provisions to conform with the above agreements, among which was the stipulation that "no telegraph company, unless specially permitted by the licensor, can be a subscriber, or use the system to collect and deliver messages from and to its customers, etc." The telephone company relied on these contracts to support its demand that the telegraph company, on becoming a subscriber, should observe the restrictions in favor of the Western Union Telegraph

Company, and alleged that it could not, under its contract with the parent telephone company, allow the telegraph company to become a subscriber on any other conditions. The court, however, held that the duty prescribed by law was paramount to that prescribed by the contract; that the owner of the property employing it in a public use must submit to legal regulations of that use, nor did the United States letters patent confer any right to use the patented instruments in any other manner than is authorized by law.[1]

§ 310. **Same Subject** (*continued*). — In a case in Ohio[2] the action was *mandamus* to compel the telephone company to put a telephone in the telegraph office of the relator, for the purpose of assisting it in carrying on its telegraph business. The telegraph company on whose relation the suit was instituted was a rival of the Western Union Telegraph Company, and was connected with the Baltimore & Ohio Railroad Company, taking charge of its telegraphing department, and also doing a commercial business. This case again brought in question the usual contract or license between the local telephone company and the American Bell Telephone Company, by which the local company was prevented from giving telephone facilities to any telegraph company except the Western Union. The license is given at length in this case. The usual State statutes requiring telegraph and telephone companies to receive and transmit despatches from other telegraph companies and from individuals was the foundation of the action, and it appeared that the Western Union Telegraph Company was enjoying the telephonic facilities. The court held that the contract between the parent Bell Company and the local company could not excuse the local company from subjection to the Ohio statute requiring all telephone companies to furnish

[1] Chesapeake & Potomac Telephone Co. *v.* Baltimore & Ohio Telegraph Co., 66 Md. 399.

[2] State *ex rel.* American Union Telegraph Co. *v.* Bell Telephone Co., 36 Oh. St. 296.

equal facilities to all subscribers. The same question was considered and decided in a case in Vermont.[1] The telephone company, as usual, made its defence on the ground that it was bound by its contract with the parent Bell Telephone Company to furnish telephones only to the Western Union Telegraph Company. The court overruled this defence, and held that the telephone company, under its obligation as a public servant, must furnish equal facilities to all telegraph companies.

§ 311. **Same Subject** (*continued*). — The same line of decisions has been followed out in the Federal courts, the earliest case being a case arising in Missouri.[2] In this case the local telephone company, a Missouri corporation, was licensed by the parent Bell Telephone Company to carry on a telephone business in the city of St. Louis upon condition that it should not establish telephonic communication with any telegraph company unless thereto authorized by the parent Bell Telephone Company, and it was expressly authorized so to connect with the Western Union Telegraph Company. The Baltimore & Ohio Telegraph Company, wishing to establish telephonic connections, was refused by the local company and applied for a *mandamus* to compel the local company to permit it so to do. The parent Bell Telephone Company was not made a party to this suit. It was held that all telegraph companies must be allowed telephonic privileges upon the same terms as the Western Union Telegraph Company, and that the parent Bell Telephone Company was not a necessary party to the suit, and the *mandamus* was granted.

In a later case in the Circuit Court of the United States,[3]

[1] Commercial Union Telegraph Co. *v.* New England Telephone & Telegraph Co., 61 Vt. 241.

[2] State of Missouri *ex rel.* Baltimore & Ohio Telegraph Co. *v.* Bell Telephone Co., 23 Fed. Rep. 539.

[3] State *ex rel.* Postal Telegraph Cable Co. *v.* Delaware & Atlantic Telegraph & Telephone Co., 47 Fed. Rep. 633.

the applicant for telephone privileges was the Postal Telegraph Cable Company, which sued for a writ of *mandamus* to compel the Delaware & Atlantic Telegraph and Telephone Company to place telephone instruments in the office of the petitioner on the same terms as given to other subscribers. The local telephone company refused to furnish its instruments to the telegraph company except on condition that they should not be used in receiving and transmitting telegraphic messages, although the Western Union Telegraph Company had instruments from the telephone company without any such restriction. The court held that under the public duties of the telephone company it was obliged to furnish instruments to all without discrimination, with equal facilities, and that telegraph companies were included as well as individuals. In this case also the telephone company tried to defend on the ground that it was forbidden by its license from the parent telephone company to supply instruments to any telegraph company to be used for telegraphic purposes, except the Western Union Telegraph Company. This defence was overruled by the court, which held that such a stipulation in the license of the local company was void as against public policy. This case was carried to the Circuit Court of Appeals, and the decision was affirmed, the court holding that while the telephone companies are not required to extend their facilities beyond such reasonable limits as they may prescribe for themselves, they cannot discriminate between individuals of the class which they undertake to serve; that if the telephone company in question had undertaken simply the business of furnishing telephones for the transmission of personal messages for individuals, excluding telegraph companies and others who forward messages for hire, it would not have been under any obligation to furnish telephones to any telegraph company, but that having, in fact, undertaken the business of furnishing telephones to telegraph companies for use in their

business, and thus extending the telephone business from individuals to telegraph companies even in a single instance, it was obliged to furnish telephones to all telegraph companies for similar purposes upon the same terms.[1] It was further held in the same case that the fact that the instruments which they use are protected by letters patent of the United States did not furnish any defence to the action, and further, that the allowing of exclusive privileges to the Western Union Telegraph Company of this nature created a monopoly, which was void under the laws of the State of Delaware.

§ 312. **Same Subject** (*continued*). — The only case in which a different decision has been rendered was American Rapid Telegraph Company *v.* Connecticut Telephone Company.[2] In this case the local (Bridgeport) telephone company was by its license from the parent telephone company restricted from allowing any telegraph company except the Western Union to use its telephone exchange for telegraphic purposes. The American Rapid Telegraph Company, having an office in Bridgeport, applied to the Connecticut Telephone Company for the use of its exchange for telegraphic purposes, but was refused, and thereupon applied for a *mandamus*, which was granted in the alternative. The defendant alleged as a defence the restrictions in its contract with the parent Bell Telephone Company, and the trial court held the defendant's answer was sufficient, and dismissed the application. The American Rapid Telegraph Company brought the case on error to the Supreme Court of the State of Connecticut, but the court affirmed the decision of the court below on the ground that the restriction in the contract with the parent company restricted the actions of the local company. The court says: —

"The plaintiff insists that the defendant (telephone com-

[1] Delaware & Atlantic Telegraph & Telephone Co. *v.* State of Delaware. 2 C. C. A. 1; s. c. 50 Fed. Rep. 677.

[2] 49 Conn. 352.

pany) has, with its services to the public as a common carrier of articulate speech, thereby made itself the servant of the public, and has subjected itself to the operation of the general law which compels all such servants to serve applicants impartially, regardless of the limitations placed upon its use of the instruments. But the property of the American Bell Telephone Company in its patent is absolute and exclusive. It can rent or sell it in whole or in part. It can refuse to make or use or to allow any one else to make or use the telephone described in it. Or it can make and sell one and no more, and put such restrictions as it pleases upon the time and manner of using that, and it was the privilege of the Connecticut Telephone Company to purchase from it even the most limited right to use one or more of its instruments, and it is not within the power of the court either to enlarge or diminish the purchase. In this respect the position of the telephone is quite unlike that of railroad companies, which have, in the exercise of their respective franchises, voluntarily undertaken by contract to put limitations upon the use of property absolutely their own, and to discriminate in favor of certain applicants for transportation; unlike that of proprietors of grain elevators, who have been declared to be warehouse men, and as such to have brought themselves within the power of the legislature to regulate their tolls and compel them to render impartial service to applicants for storage; and unlike that of railroad companies which have undertaken to bind themselves by contract not to do, in behalf of the public, the service the doing of which was the consideration upon which they received valuable franchises. The record does not show that the defendant ever exercised the right or declared to the public that it had the right to use the telephonic instruments upon any other terms than such as are strictly conformable to the measure of the use granted to it by the owner of them. It does not show, and we may not assume, that it failed to perform the

largest possible measure, and does show that it has offered that measure to the plaintiff."

§ 313. **Same Subject** (*continued*). — This decision, being contrary to the general current of decisions on this point, especially those in the federal courts, probably would not furnish authority outside of the State in which it was decided. It is also to be noticed that in this case no question was raised of the telephone company having, in fact, furnished telephonic facilities for telegraphic purposes to any other telegraph company, and possibly this fact may have affected the decision of the court, on the principle established in the Maryland and Delaware cases, that the telephone company may limit the business which it holds itself out to do, and if, in fact, it does not engage in the business of furnishing telephones to telegraph companies for telegraph purposes, it cannot be compelled to establish that branch of the business. Further, by a recent statute in that State, the rule is changed, and telephone companies are obliged to furnish their instruments and service to all telegraph companies, without discrimination as to use or price, and equity courts are given jurisdiction to enforce this law.[1]

§ 314. **Telephones for Individuals.** — In several cases the courts have been called upon to compel telephone companies, by *mandamus*, to furnish telephones to individuals. The objection of the telephone company in these cases has mainly been a question of price or rental, and the real question involved is the right of the local authorities to interfere with the prices or the rental of telephones.

This point was raised in a case in Pennsylvania.[2] The question was largely one of the sufficiency of the pleadings, the telephone company filing an answer to the petition, and the petitioner demurring thereto. The petition was brought

[1] Acts 1889, c. 160. See *supra*, § 297.

[2] Central District & Printing Telegraph Co. *v.* Commonwealth, 114 Pa. St. 592.

on the relation of one Friend, to compel the telephone company to put a telephone in his place of business for the sum of eighty-four dollars. The allegations of the petition substantially showed that the telephone company charged one hundred and fifty dollars to Friend for putting in his telephone, and that they charged only eighty-four dollars for similar service at similar distances from their central office. The answer denied these allegations, and stated that the relator's place of business was a mile and a half from their central office, and that the eighty-four-dollars rate was limited to one half-mile from the central office.

The petitioner filed a demurrer to this answer, and the court held that the allegations of both petition and answer were substantially good, although not technically perfect; that the petition alleged a good cause of action, and the answer alleged a good defence. No question of statutory price was raised in this case, and the demurrer was overruled.[1]

§ 315. **Statutory Telephone Rates.** — The validity of an ordinance of the city of St. Louis establishing a maximum rate for the rental of telephones was brought up in the case of St. Louis *v.* Bell Telephone Company.[2] The defendant company admitted that the State of Missouri might fix such a maximum rate, but denied that the city of St. Louis had ever been authorized by the State to exercise this power. The city admitted that there was no direct delegation of this power by statute to it, but claimed it under a statute giving it the right to "license, tax, and regulate telegraph companies." The court held that the telephone company was, in substance, a telegraph company for the purposes of this statute, but that as the right to fix certain rates of charge for ferries, hacks, and other similar public employments was

[1] Cf. Martinsburg Bank *v.* Central Pennsylvania Telephone & Supply Co., 150 Pa. St. 36; Louisville Transportation Co. *v.* American District Telephone Co., 24 Alb. L. J. 283.

[2] 96 Mo. 623.

given to the city in express terms, a similar right could not be inferred from the use of the word "regulate" in connection with the words "license" and "tax."

§ 316. **Indiana Cases.** — In several cases in Indiana the same question was brought up. The first one was the case of Hockett *v.* State.[1] The facts were these. The State statute required the telephone company to put in one telephone for any person requiring the same for the sum of three dollars per month. Hockett, living two miles outside the city limits, and desiring telephone service, made a contract with the telephone company to run a line of wires out to his house and put in a telephone with the usual apparatus of hand telephone, Blake transmitter, and magneto bell, to be paid for at a rental exceeding the sum of three dollars per month. The telephone company accordingly did so. Thereupon, when the treasurer of the telephone company called for his rental, Hockett paid it, and filed an information with the Attorney-General of the State, accusing the telephone company of receiving a greater rental than the law allowed. The case was carried by appeal to the Supreme bench, and the court discussed the question at great length. First, whether the statute requiring telephone companies to furnish telephone service to all persons without discrimination was a valid and reasonable statute and constitutional: Second, whether the statute forbidding the telephone company to charge more than a specified maximum rental was constitutional; and held in both cases that they were, overruling the objection of the telephone company that, as their business was based upon patents granted by the United States, it was not competent for a State court to interfere with it. The court sustained its decision by showing that such a statute was an exercise of the police power of the State or rather of the power of each State to regulate all matters in its own jurisdiction, and the fact that the instru-

[1] 105 Ind. 250.

ments used were protected by United States patents did not interfere with this prerogative of the State; and furthermore, that the telephone company is engaged in a public business or employment, and therefore is subject to regulations by the State officials in the same manner as public carriers. The court further discussed the question of whether, under the statute, the word "telephone" meant a single hand instrument technically known as a telephone, or whether it meant a combination of telephone, transmitter, and magneto bell, as the same are usually employed for the transmission of messages by telephone, and held that it meant the latter.

§ 317. Same (*continued*). — The next case was that of Central Union Telephone Company *v.* Bradbury.[1] This case was substantially the same in facts as the former, except that the person who filed the information was not a person who had secured telephone service, but who demanded telephone service at the rate stipulated in the statute, and the turning-point of this case was the question whether, when he demanded a telephone, using the language of the statute, this demand made it necessary to furnish him with the complete outfit of one telephonic apparatus, or whether the law would be satisfied by the company furnishing him with one hand telephone. This being substantially the same question as was discussed in the previous case, the court arrived at the same conclusion, that the law requires the telephone company to furnish the best outfit that is in ordinary use at the time.

The next one was the case of Johnson *v.* State.[2] In this case the same points were discussed as arose in the cases of Bradbury and Hockett. The telephone company furnished a telephone to a subscriber for the statutory rate, and then proceeded to collect from him, in addition to the statutory rate, a fixed extra charge for the use of the telephone

[1] 106 Ind. 1. [2] 113 Ind. 143.

by non-subscribers, without regard to the number of non-subscribers who used it, or the amount of its use. This was about one-quarter extra. The court discussed the same questions as in previous cases, and held that it was an evasion of the law to collect the fixed extra toll for the alleged use by non-subscribers, and that it was, in fact, charging a rental greater than the statute allowed, although it was divided up into two different sections.

The next case was Central Union Telephone Company *v.* State.[1] In this case the telephone company, in order to evade the statute which required it to furnish a telephone at the monthly rental of three dollars, discontinued the rental business entirely, and established a series of public offices, for which it issued tickets. An inhabitant of the town demanded that the company put a separate telephone into her store, and at the rental of three dollars per month. The company refused, and she petitioned for a writ of *mandamus* to compel it to comply with this demand. The company defended on the ground of the fact that this was discriminating in her favor, and furnishing her with better service and better facilities than were given to others, in contravention of the statute. The court held that the effect of the two statutes of 1885 was to make it necessary for the telephone company to put in a separate telephone in any case where it was demanded by an inhabitant of the town, at the prescribed rental, but that outside of such demands the company might carry on a business at public offices at such charges as it had established, and that *mandamus* was the proper remedy for this action.

§ 318. **Same** (*continued*). — The next case was Central Union Telephone Company *v.* State,[2] which was substantially the same in facts as the foregoing case, and was held to be governed by that case.

[1] 118 Ind. 194. [2] 123 Ind. 113.

A similar case arose in Nebraska,[1] in which the facts were that A., an attorney at law, had a telephone put into his office. The company did not furnish with the telephone a directory for some time, and the attorney refused to pay for the telephone for the time during which he was without a directory. The company therefore took out the telephone, and the attorney applied for a writ of *mandamus* to have it put in again. The court held that the writ should be granted; that the fact that the subscriber had refused to pay rental or was indebted to the company did not deprive him of the right under the statute to have a telephone put in, and that the only remedy for the company was to sue for the unpaid rental. It may be doubted whether this decision would be generally upheld, as it could hardly be supposed that the telephone company is obliged to supply telephones to persons who refuse to pay for them. Its obligation in this respect, like all other public companies, is simply to transact business for those who pay the proper charges therefor. The only way in which this decision can be maintained on principle is by assuming that the failure to furnish a directory was a sufficiently essential breach of the contract of hiring the telephone to afford a defence to an action for the rental during the time that the subscriber was without a directory.

§ 319. **Discrimination of Electric Light and Railway Companies.** — For many reasons arising from the objects and mode of operation of electric light plants, there has been little occasion to bring into question, either in statutes or decisions of the courts, any cases of discrimination by such companies. In a few States they are included in general anti-discrimination acts along with telegraph and telephone lines.[2] In New York State there is an act which compels electric light companies, upon application in writing of the

[1] State *v.* Nebraska Telephone Co., 17 Neb. 126.

[2] N. H. Pub. Stats., ch. 81, § 13. See *ante*, § 285.

owner or occupant of any building or premises within one hundred feet of its wires, and payment by him of all money due from him to the corporation, to supply electric light as it may be required for lighting such building or premises, notwithstanding there are arrears of rent due for electric light or fixtures furnished to a former occupant, unless the present occupant has agreed with the former occupant to pay such arrears; and if the electric-light company refuses or neglects to supply electric light for ten days after the application and after the deposit with it of a reasonable sum of money for the rent of the light and fixtures for two months, the electric-light company forfeits ten dollars to the applicant, and the further sum of five dollars per day during such neglect or refusal; but if the ground is frozen or other serious obstacle exists to connecting the applicant with the wires, or if he does not deposit in advance the cost of such connection, the company is excused from furnishing light. And it is further provided that any officer or agent of the electric-light company may enter any house or building at reasonable hours, for the purpose of inspecting and examining the meters and fixtures, upon exhibiting a written authority signed by the president and secretary of the company; and further, that on refusal or neglect to pay the rent for the light and fixtures, the light may be turned off and the fixtures removed.[1]

In the case of electric railways the only kind of discrimination possible is in case of attempts by one line to use the tracks of another, and this, so far as it concerns electric railways, has been already considered in treating of the condemning of the use of tracks by the right of eminent domain.[2] The subject of the right of one street railway to use the tracks of another in general is outside the scope of this work, being a branch of the laws of street railways in general, for which reference should be had to treatises on that subject.

[1] Laws 1890, c. 566, Art. 6, §§ 60–68. [2] *Supra*, § 127.

NOTE. *Regulation of Prices.* — In several States, statutes have been passed regulating the prices which may be charged by telegraph and other electric companies. Such statutes exist in Florida, Rev. Stat. §§ 2258, 2722; Maryland, Laws 1892, ch. 387; Mississippi, Ann. Code, § 4291; Nebraska, Comp. Stats., ch. 89 a, §§ 7, 8; ch. 12 a, § 50; New Jersey, Rev. Title Telegraph, § 4; Pennsylvania, Bright. Purd. Dig. p. 1629, § 10; Vermont, Rev. Laws, §§ 3657, 3658. See also *ante*, §§ 300, 302, and *post*, §§ 321–348. The reader is referred to these statutes for special rates fixed in these States. In many States municipal authorities are authorized to fix rates for electric-light service and, in some instances, telephone and telegraph service. The introduction of these statutes would increase unduly the size of this work, and moreover they are so liable to change that any statement of them would be unreliable. The cases upon these points have been few in number. Those relating to telephones have been discussed in the preceding chapter, §§ 314–318. The question of half-rates for night telegrams will be discussed in connection with the subject of night messages, *infra*, §§ 535, 536.

CHAPTER XV.

OPERATION OF TELEGRAPH LINES. — STATUTES.

§ 320. Operation of Telegraph Lines.
321. Arkansas.
322. California.
323. Colorado.
324. Connecticut,
325. Georgia.
326. Illinois.
327. Indiana.
328. Iowa.
329. Louisiana.
330. Louisiana (*continued*).
331. Maine.
332. Maryland.
333. Massachusetts.
334. Michigan.
335. Minnesota.
336. Mississippi.
337. Missouri.
338. Nebraska.
339. Nevada.
340. New Jersey.
341. New York.
342. Ohio.
343. Oregon.
344. Pennsylvania.
345. Tennessee.
346. Virginia.
347. Washington.
348. Wisconsin.
349. Summary.

§ 320. **Operation of Telegraph Lines.** — In view of the great importance of the statutes regulating the operation of telegraph lines, and the large number of decisions of the courts upon questions of operation, it is deemed best to consider the operation of telegraph lines entirely separate from the operations of other electric companies, the dissimilarity of the modes of operation being such as to render any attempt to combine them confusing to the consideration of the subject. The mode of treatment will be first to consider the statutes which in a majority of the States have been enacted defining and declaring and sometimes limiting or changing the common-law duties of telegraph companies arising from the public character of their occupation; then to consider the duties and liabilities of telegraph companies, both at common law and under the statutes, including the very important subject of the liability of telegraph companies for negligence in the transmission and delivery of messages. The statutes which regulate the operation of telegraph companies are as follows.

§ 321. **Arkansas.** — It is the duty of the owner or association owning any telegraph lines doing business within the State to receive despatches from and for other telegraph lines and associations, and from and for any individual, and on payment of their usual charges for individuals for transmitting despatches as established by the rules and regulations of such telegraph line to transmit the same with impartiality and good faith, under the penalty of one hundred dollars for every neglect or refusal so to do, to be recovered with costs of suit in the name and for the benefit of the person sending or desiring to send such despatch. Provided, however, that this statute is not to be construed as requiring any telegraph company or association to receive and transmit despatches from or for any other company or association owning a line of telegraph parallel with or doing business in competition with the line on which the despatch is required to be sent.[1]

In consideration of the right of way over public property given by the statute, every telephone and telegraph corporation is required in case of war, insurrection, or civil commotion of any kind, and for the arrest of criminals, to give immediate despatch at the usual rates of charge, to any message connected therewith, of any officer of the State or of the United States, failure to do so being a misdemeanor.[2] All other messages, including those received from other telegraph or telephone companies must be transmitted in order of receipt correctly and without unreasonable delay, and shall be strictly confidential, except that arrangements may be made with the publishers of newspapers for the transmission of intelligence of general and public interest, failures to do so being a misdemeanor, and subjecting the company to liability and damages to the party aggrieved.[3]

[1] Ark. Dig. § 6419.

[2] Acts 1885, Act 107, §§ 5, 6. See also Dig. § 6421.

[3] Acts 1885, Act 107, §§ 7, 8. See also Dig. § 6420.

§ 322. **California.** — A carrier of messages by telegraph must, if it is practicable, transmit every such message immediately upon its receipt; but if this is not practicable, and several messages accumulate upon his hands, he must transmit them in the following order: —

First. Messages from public agents of the United States or of the State of California on public business.

Second. Messages intended in good faith for immediate publication in newspapers, and not for any secret use.

Third. Messages giving information relating to the sickness or death of any person.

Fourth. Other messages in the order in which they were received.[1]

And every person whose message is refused or postponed contrary to this statute may recover from the telegraph company his actual damages and fifty dollars in addition thereto.[2]

A carrier of messages for reward by telegraph must deliver them at the place to which they are addressed, and to the person for whom they are intended, provided such place or person is within a distance of two miles from the main office of the carrier in the city or town to which the messages are transmitted, and the carrier is not required in making the delivery to pay on his route toll or ferriage, but for any

[1] Cal. Civ. Code, § 2207.

[2] Ib. § 2209. Every agent, operator, or employee of any telegraph office who wilfully refuses or neglects to send any message received at such office for transmission, or wilfully postpones the same out of its order, or wilfully refuses or neglects to deliver any message received by telegraph, is guilty of misdemeanor; but this act does not require any message to be received, transmitted, or delivered unless the charges thereon have been paid or tendered, nor require the sending, receiving, or delivering of any message, counselling, aiding, abetting, or encouraging any treason against the government of the United States or of California, or other resistance to the lawful authority, or any message calculated to further any fraudulent plan or purpose, or to instigate or encourage the perpetration of any unlawful act, or to facilitate the escape of any criminal or any person accused of a crime. Cal. Pen. Code, § 638.

distance beyond one mile from such office compensation may be charged for a messenger employed by the carrier.[1]

A carrier of messages for reward must use great care and diligence in the transmission and delivery of messages.[2]

§ 323. **Colorado.** — If any company owning or operating any line of telegraph in that State shall refuse to receive any despatch from any other company or person owning or operating any telegraph line in that State, or shall refuse or wilfully neglect to transmit the same in good faith and without partiality, the company so offending shall forfeit all rights and franchises acquired under the laws of that State, and may be enjoined therefrom by a bill of complaint filed with any court of competent jurisdiction, and be liable to pay all damages which shall accrue by reason of such refusal to the person or company offering such despatch for transmitting.[3]

Moreover it shall be the duty of all persons employed in transmitting messages by telegraph to transmit them in the order in which they are received, and any person who shall fail so to transmit a message, or who shall suppress a message, or who shall make known the contents of a message to any person other than the one to whom it is addressed or his agent, shall be guilty of a misdemeanor and fineable not exceeding five hundred dollars, and the company shall be liable for all damages resulting therefrom.[4]

§ 324. **Connecticut.** — Telegraph or telephone companies must receive despatches for any person and for other telegraph or telephone lines, and transmit them in the order of the time in which they are received on the payment of their usual charges, under the penalty of one hundred dollars for neglect so to do, to be recovered with costs by the party aggrieved; but arrangements may be made with the publishers of newspapers for the transmission of news out of its

[1] Cal. Civ. Code, § 2161.
[2] Ib. § 2162.
[3] Mill's Annot. Stat. § 589.
[4] Ib. 590.

general order, and all communications for officers of justice shall take precedence of all other despatches.[1]

And every telegraph company engaged in the business of despatching messages shall, in towns where no free delivery is maintained, deliver all despatches to the persons to whom they are addressed or their agents by messenger, upon prepayment by the person sending such despatch of any charge due for such delivery, provided such persons addressed or their agents reside within one mile of the telegraph office to which the despatch is sent, under a penalty of twenty dollars, to be recovered by the persons to whom the despatch should have been delivered as aforesaid, in an action on this statute.[2]

§ 325. **Georgia.** — Every electric telegraph company, with a line of wires wholly or partly in Georgia, and engaged in telegraphing for the public, shall during the usual office hours receive despatches, whether upon other telegraphic lines or from individuals; and on payment or tender of the usual charge, according to the regulations of such company, shall transmit and deliver the same with impartiality and good faith and with due diligence, under penalty of fifty dollars, which penalty may be recovered by suit in a court having jurisdiction thereof, by either the sender of the despatch or the person to whom sent or directed, whichever may first sue; provided that this statute shall not be construed as impairing or in any way modifying the right of any person to recover damages for any such breach of contract or duties by any telegraph company, and said penalty and said damages may, if the party so elect, be recovered in same suit.[3]

Such companies must deliver all despatches to the persons to whom the same are addressed, or to their agents, on payment of any charges due upon the same, provided such

[1] Conn. Gen. Stat. § 3952. [2] Ib. § 3953.
[3] Ga. Laws 1887, No. 365, § 1; Laws 1892, No. 93.

persons or agents reside within one mile of the telegraphic station, or within the city or town in which such station is, or if not residing in said limits, that the sender of the despatch specify in the despatch the place at which in said limits the despatch is to be delivered.[1]

And in all cases the liability of said company for messages in cipher, in whole or in part, shall be the same as if the same were not in cipher.[2]

§ 326. **Illinois.** — If any person or company owning or operating any telegraph line in Illinois refuses to receive any despatch from any other company or person owning or operating any telegraph line in Illinois or refuses or wilfully neglects to transmit the same in good faith and without partiality, the company or person so offending shall forfeit all rights and franchises acquired under the laws of that State, and shall forfeit all right to transact telegraph business in that State, and may be enjoined therefrom by bill of complaint filed in any court of competent jurisdiction, and be liable to pay all damages which shall accrue, by reason of such refusal, to the company or person offering such despatch for transmission.[3]

It shall be the duty of all persons employed in transmitting messages by telegraph, to transmit them in the order in which they are received, and any persons who shall fail so to transmit a message, or who shall suppress a message, or who shall make known the contents of a message to any person other than the person to whom it is addressed or his agent, shall be deemed guilty of a misdemeanor, and punished by fine not exceeding a thousand dollars.[4]

§ 327. **Indiana.** — Every electric telegraph company with

[1] Ga. Laws 1887, No. 365, § 2; Laws 1892, No. 93.

[2] Ib. § 3. A statute partially covering the same ground was passed in 1889, No. 672. How far it is repealed by the statute of 1892 is not apparent, but it is assumed that the later act is intended to cover the whole subject.

[3] Ill. Ann. Stat., c. 134. par. 6.

[4] Ib. § 7.

a line of wires wholly or partly in this State, and engaged in doing a general telegraphic business, shall, during usual office hours, receive despatches, whether from other telegraph lines or other companies or individuals, and shall, upon the usual terms, transmit the same with impartiality and good faith, and in the order of time in which they are received, and shall in no manner discriminate in the rates charged or words or figures charged for or manner or conditions of service between any of its patrons, but shall serve individuals, companies, and other telegraph corporations with impartiality, provided, however, that arrangements may be made with the publishers of newspapers for the transmission of intelligence of general and public interest out of its order, and that communications for and from officers of justice shall take precedence of all others.[1]

Any person or corporation violating any of the provisions of this act shall be liable to any party aggrieved in a penalty of one hundred dollars for each offence, to be recovered in a civil action in any court of competent jurisdiction; provided that nothing in this act shall be construed to take away or abridge the right of such aggrieved party to appeal to a court of equity to prevent such violations or discriminations, by injunction or otherwise.[2]

Telegraph companies shall be liable for special damages occasioned by failure or negligence of their operators or servants in receiving, copying, transmitting, or delivering despatches, or for the disclosure of the contents of any private despatch to any person other than to him to whom it is addressed or his agent.[3]

§ 328. **Iowa.** — If the proprietor of any telegraph within this State, or the person having the control and management thereof refuses to receive despatches from any other

[1] Ind. Ann. Stat. § 5511, amended by Act of 1885, c. 48.
[2] Ib. § 5512, amended by Act of 1885, *supra*.
[3] Ib. § 5513.

telegraph line, or to transmit the same with fidelity and without unreasonable delay, all the laws in the State in relation to limited partnerships, to corporations, and to the obtaining of private property for the use of such telegraph shall cease to operate in favor of the proprietor thereof; and if private property has been taken for the use of such telegraph without the consent of the owner, he may reclaim and recover the same.[1]

Any person employed in transmitting messages by telegraph must do so without unreasonable delay, and any one who wilfully fails thus to transmit them, or who intentionally transmits a message sent or received to any person except him to whom it is addressed, or to his agent or attorney, is guilty of a misdemeanor.[2]

The proprietor of a telegraph is liable for all mistakes in transmitting messages made by any person in his employment, and for all damages resulting from a failure to perform any other duties required by law.[3]

§ 329. **Louisiana.** — Any operator, clerk, director, messenger, or other person in the employ of any telegraph company having an office or station in this State, who shall refuse or omit to send or deliver any despatch or message, on which charges or fees shall have been paid or offered to be paid, or for the payment of which a contract shall have been made, or cause or direct to be detained or delayed such despatch or message in order to give precedence to a message or despatch subsequently brought to the office or station, or who shall in any way give precedence in time in sending or delivering any despatch or message belonging to a director, officer, or stockholder of such company or other person, over any despatch or message previously offered for transmission, or who shall reveal, make use of, or make public, any despatch or message, shall, on conviction, be fined not

[1] Ia. Ann. Code, § 2106.
[2] Ib. § 2107.
[3] Ib. § 2108.

less than fifty dollars nor more than one hundred dollars, one half of which goes to the Charity Hospital of New Orleans, and the other half for the use of the parish where the offence is committed.[1]

§ 330. **Louisiana** (*continued*). — No operator or agent of any telegraph company shall be permitted to transmit any message which can in any way tend to defeat the ends of justice by preventing the apprehension of fugitives from justice, or by communicating such information as may enable persons charged with offences to escape. Any person so offending shall be imprisoned not less than twelve months nor more than two years at hard labor, and fined not less than two hundred nor more than five hundred dollars.[2]

All telegraph companies shall be bound on application of any officer of this State or of the United States, in the event of any riot, insurrection, or resistance to public authority, or whenever it may be necessary for the prevention of crime or the apprehension of persons accused of crime or fleeing from justice, to give these communications immediate despatch. And if any officer, clerk, or operator shall refuse or intentionally omit to transmit such communications, or shall designedly alter or falsify the same for any purpose whatever, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding one thousand dollars and imprisoned not longer than one year. It shall further be their duty to transmit all communications which are not immoral or contrary to law or public policy as are presented by persons offering to pay the usual rates therefor, and in the order in which the applications are made.[3]

§ 331. **Maine.** — A person or company owning or using a line of telegraph, wholly or partly in the State, for any error or unnecessary delay in writing out, transmitting, or deliver-

[1] La. Rev. Stat. § 921.
[2] Ib. § 922.
[3] Ib. § 923.

ing a despatch within its delivery limits, making it less valuable to the person interested therein, is liable for the whole amount paid on such despatch. All despatches shall be transmitted in the order in which they are received, under a penalty of one hundred dollars, to be recovered by the person whose despatch is wilfully postponed. An operator or agent who designedly falsifies a despatch forfeits not less than twenty nor more than one hundred dollars, to be recovered in an action of debt; and in case of his avoidance or inability to pay such judgment, the person or company employing him forfeits a like sum; and if such operator or agent wilfully divulges any part of the contents of a private despatch intrusted to him for transmission or delivery, he shall be fined not exceeding one hundred dollars, or imprisoned not more than three months.[1]

Nothing herein exonerates telegraph operators, agents, clerks, or other officers from liability for fraud committed or attempted by means of telegraphic communication, or the company from any liability existing at common law for the neglect or wrong-doing of such company or its agents.[2]

§ 332. **Maryland.** — Persons, associations, or corporations owning any telegraph line doing business within the State shall receive despatches from and for other telegraph lines, associations, and companies, and from and for any individual, and shall transmit such despatches in the manner established by the rules and regulations of such telegraph lines, and in the order in which they are received, with impartiality and good faith, under the penalty of one hundred dollars for every neglect or refusal to do so, to be recovered with costs of suit, in the name and for the benefit of the person or persons sending or desiring to send such despatch; provided, however, that arrangements may be made with the proprietors or publishers of newspapers for

[1] Me. Rev. Stat., c. 53, § 1. [2] Ib. § 2.

transmission of intelligence of general and public interest, for the purpose of publication, out of its order.[1]

§ 333. **Massachusetts.** — Every company shall receive despatches from and for other telegraph lines, companies, and associations, and from and for any person, and on payment of the usual charges for transmitting despatches according to the regulations of the company, shall transmit the same faithfully and impartially. For every wilful neglect or refusal so to do the company shall forfeit a sum not exceeding one hundred dollars, to be recovered in an action of tort by the person, association, or company sending or desiring to send the despatch.[2]

Telegraph companies and associations shall receive, compute, and transmit despatches received at their office from other telegraph companies or by mail, at the same rates of charge as for despatches received for transmission from individuals in person at the same offices, bearing date of the day and at the place of the office where any such despatch is received. For every wilful neglect or refusal to comply with the foregoing provisions by a telegraph company or association, it shall forfeit a sum not exceeding one hundred dollars, to be recovered in an action of tort by the person, company, or association sending or desiring to send the despatch.[3]

All persons, associations, and corporations engaged in the business of transmitting or receiving telegraphic messages for hire shall be liable and responsible in each case for all damages up to the amount of one hundred dollars actually caused by their negligence, or that of their servants or agents, in transmitting, receiving, or delivering such messages, and any limit of such liability or responsibility by contract or regulation shall be valid and binding only for the excess of such damages in each case above said sum of one hundred dollars.[4]

[1] Md. Pub. Gen. Laws, Art. 23, § 228.
[2] Mass. Pub. St., c. 109, § 10.
[3] Ib. § 11.
[4] Acts 1885, c. 380, § 1.

No action for the recovery of such damages shall be maintained unless a claim therefor is presented in writing to such person, association, or corporation, or to some officer or agent thereof within sixty days of the time when such right of action accrues.[1]

The provisions of this act do not apply to any negligence occurring in a telegraph office established for the convenience and safety of a railroad corporation in the running of its trains, and transacting a telegraph business only as incidental thereto, nor to any negligence in the delivery of messages received at any such office.[2]

§ 334. **Michigan.** — It is the duty of all telegraph companies incorporated either within or without this State doing business within this State, to receive despatches from and for other telegraph companies' lines, and from and for any individual, and on payment of their usual charges for individuals for transmitting despatches as established by the rules and regulation of such telegraph companies, to transmit the same with impartiality and good faith. Such telegraph companies are liable for any mistakes, errors, or delays in the transmission or delivery, or for the non-delivery of any repeated or non-repeated message, in damages to the amount which such person or persons may sustain by reason of mistakes, errors, or delays in the transmission or delivery, due to negligence of such company, or for the non-delivery of any such despatch, due to negligence of such telegraph company or its agents, to be recovered with costs of suit by the person or persons sustaining such damage.[3]

It is likewise the duty of every such telegraph company to transmit all such despatches in the order in which they are received. In case such telegraph company shall refuse or neglect to so transmit such despatches, such telegraph company is liable for all damages sustained by any person or

[1] Acts 1885, c. 380, § 2.
[2] Ib. § 3.
[3] Acts 1893, No. 195, § 1.

persons whose despatch is postponed or delayed out of its order as herein prescribed, to be recovered as in the foregoing section; provided, however, that arrangements may be made with the proprietors or publishers of newspapers for the transmission, for the purpose of publication, of intelligence of general and public interest out of its regular order.[1]

§ 335. **Minnesota.** — In the transmission and delivery of messages, persons, companies, and corporations transmitting messages by telegraph lines are liable for want of ordinary care, any contract, notice, or condition to the contrary notwithstanding, and any notice, condition, or contract stipulating for exemption from consequences of lack of ordinary care shall be void.[2]

When the party to whom a message is addressed resides or does business within the corporate limits of any city or village where a telegraph office is located, at the point of destination, the same shall be promptly delivered at his place of residence or business if known. In other cases he shall be notified by next mail where he can find same.[3]

Messages delivered to the owner or agent of any telegraph line operated in this State, in whole or in part, shall be transmitted in the order in which they are received; provided, however, that any message directing the movement of railroad trains, in case of sickness or death, and those relating to the administration of criminal laws, and government despatches shall take precedence if the officer or person sending the same so request.[4]

If any person, persons, company, or corporation owning or operating a telegraph line, in whole or part, within this State shall fail to transmit any message within a reasonable length of time, or if it is shown due diligence has not been exercised after reception thereof for that purpose, or shall

[1] Acts 1893, No. 195, § 2.
[2] G. S. 1894, § 2636.
[3] Ib. § 2637.
[4] Ib. § 2628.

fail to deliver the same to the party to whom the same is addressed, if known, as provided for in section three of this act, within a reasonable length of time after the same shall have arrived at the point of destination, they shall be liable to a civil action at the suit of the party injured, for all actual damages sustained by reason of such neglect or omission, with the legal costs of suit to be recovered in such action before any court having competent jurisdiction.[1]

Any telegraph company delivering a message shall state plainly upon such message the date and the hour at which such message was received at the original point for transmission.[2]

§ 336. **Mississippi.** — Telegraph companies or associations are bound, on application of any officer of this State, or of the United States, in case of any war, insurrection, riot, or other civil commotion or resistance of public authority, or for the prevention and punishment of crime, or for the arrest of persons suspected or charged therewith, to give to the communications of such officers immediate despatch at the price of ordinary communications of the same length.[3]

A telegraph or telephone company must deliver all messages addressed to a person residing or having a place of business in any city, town, or village where it may have an office, or within one mile of its office, and if any telegraph or telephone company receives any message or matter for transmission, and fails, neglects, or refuses without good and sufficient reason, to transmit correctly and deliver the same within a reasonable time to the person addressed, such person or the person injured is entitled to recover of the company in default the sum of twenty-five dollars in addition to damages for any injury.[4]

§ 337. **Missouri.** — It is the duty of every telephone or telegraph company, incorporated or unincorporated, operating any telephone or telegraph line in this State, to provide suffi-

[1] G. S. 1894, § 2639.
[2] Ib. § 2640.
[3] Annot. Code, § 857.
[4] Ib. § 4326.

cient facilities at all its offices for the despatch of the business of the public, to receive from and for other telephone or telegraph lines, and from and for any individual, and on payment or tender of their usual charges for transmitting despatches, as established by the rules and regulations of such telephone or telegraph line, to transmit the same promptly and with impartiality and good faith under a penalty of two hundred dollars for any neglect or refusal so to do, to be recovered with costs of suit, by civil action, by the person or persons or company sending or desiring to send such despatch, one-half of the amount recovered to be retained by the plaintiff, and one-half to be paid into the county public-school fund of the county in which the suit is instituted; and the burden of the proof shall be upon the company to show that the wire was engaged, as the reason for the delay in transmitting such despatch.[1]

Every telephone or telegraph company organized under the laws of this State is liable for special damages occasioned by the failure or negligence of their operators or servants, in receiving, copying, transmitting, or delivering despatches: and for the disclosure of any of the contents of any private despatches to any person other than to him to whom it is addressed, or to his agent, they are liable to the sender of the despatch and to the person to whom it is addressed, in the sum of fifty dollars to each, recoverable by an action before a justice of the peace, and for all special damages in addition thereto.[2]

§ 338. **Nebraska.** — All telegraph companies and associations operating telegraph lines in this State must transmit and forward all despatches directed to newspapers, or private individuals, or public officers with impartiality, in the order in which they are received, and use due diligence in their delivery without discrimination as to any person or party to whom they may be directed.[3]

[1] Rev. Stat. Mo. § 2725.

[2] Mo. Rev. Stat. § 2729.

[3] Comp. Stat. c. 89 a, § 5.

Every officer or employee of any telegraph company or association engaged in the transmission of despatches who shall wilfully delay the transmission or delivery of any despatch, or divulge the contents of any despatch intrusted to his or her care, to any person except the party entitled to receive the same, shall be guilty of a misdemeanor, and upon conviction shall be punished by fine of not less than fifty dollars, nor more than one hundred dollars for each offence, or imprisonment of not less than thirty days nor more than three months in the county jail at the discretion of the court.[1]

If any telegraph company, association or organization, engaged in the transmission of telegraphic despatches from any place in this State, or the person having the control or management thereof, refuses to receive despatches from any person, corporation, or other telegraph company, or to transmit the same with fidelity and without unreasonable delay, it shall be guilty of a misdemeanor, and, upon conviction shall be fined for each and every offence in the sum of not less than fifty dollars nor more than one hundred dollars, and in addition be liable for damages to the person or corporation sustaining a loss by reason of such failure or refusal to so transmit.[2]

Any telegraph company engaged in the transmission of telegraphic despatches is liable for the non-delivery of despatches intrusted to its care, and for all mistakes in transmitting messages made by any person in its employ, and for all damages resulting from a failure to perform any other duty required by law, and any such telegraph company shall not be exempted from any such liability by reason of any clause, condition, or agreement contained in its printed blanks.[3]

§ 339. **Nevada.** — Such line or lines of telegraph as avail

[1] Comp. Stat. c. 89 a, § 6.
[2] Ib. § 11.
[3] Ib. § 12.

themselves of the provisions of this act are to be governed in all respects by the general laws of the State regulating telegraph lines, do the business of side lines, and transmit all despatches in the order in which they are received, under the penalty of one hundred dollars, and all damages sustained thereby, to be recovered, with costs of suit, by the person or persons whose despatch is postponed out of its order, provided that arrangements may be made with publishers of newspapers for the transmission of intelligence of public and general interest out of its order; and provided further that preference may be given to official despatches for the detection and capture of criminals. Messages on public business may be sent by the State of Nevada over such line free of charge.[1]

By another section it is the duty of any telegraph company doing business in this State to transmit all despatches in the order in which they are received, under the penalty of one hundred dollars, to be recovered with costs of suit by the person or persons whose despatch is postponed out of its order, provided that communications to and from public officers on official business may have precedence over all other communications; and provided also that intelligence of public and general interest may be transmitted for publication out of its order.[2]

§ 340. **New Jersey.** — Any telegraph or telephone company is prohibited from knowingly carrying any message or messages that shall further or promote the interest of unlawful pursuits, or in any way enable any person or persons to carry on any business or pursuit declared unlawful by the statutes of New Jersey.[3]

Any company, person, or corporation carrying such message is deemed guilty of a misdemeanor, and upon conviction may be punished by a fine of one thousand dollars.[4]

[1] Gen. Stat. Nev. § 919. See also § 925 for fine.

[2] Gen. Stat. § 941. As to New Hampshire see Pub. St. c. 81, § 13.

[3] New Jersey, Acts 1894, c. 48, § 1. [4] Ib. § 2.

§ 341. **New York.** — Every such corporation, telegraph and telephone, shall receive despatches from and for other telegraph and telephone, lines or corporations, and from or for any individuals, and on payment of the usual charges by individuals for transmitting despatches, as established by the rules and regulations of such corporations, transmit the same with impartiality and good faith, and in the order in which they are received; and if it neglects or refuses so to do, it shall pay one hundred dollars for such refusal or neglect to the person or persons sending or desiring to send any such despatch, or entitled to have the same so transmitted; but arrangements may be made with the publishers of newspapers for the transmission for publication of intelligence of general and public interest out of its regular order.[1]

§ 342. **Ohio.** — Every company incorporated or unincorporated, operating a telegraph line in this State must receive despatches from and for other telegraph lines, and from and for any individual; and on payment of its usual charges for transmitting despatches as established by the rules and regulations of the company transmit the same with impartiality and good faith, under a penalty of one hundred dollars for each case of neglect or refusal so to do, to be recovered with costs of suit by civil action in the name and for the benefit of the person or company sending or forwarding or desiring to send or forward the despatch.[2]

Every telegraph company, incorporated or unincorporated, operating any telegraph lines in this State, must transmit and deliver all despatches in the order in which they are received, for transmission or delivery under the like penalty of one hundred dollars, as provided in section thirty-four hundred and sixty-two; but arrangements may be made with

[1] New York, Acts 1890, c. 566, art. 103.

[2] Rev. Stat. (Smith & Ben.), § 3462. These sections apply also to telephones, § 3471.

the proprietors and publishers of newspapers for the transmission, for the purpose of publication, of intelligence of general and public interest out of its regular order, and despatches by officers of the State or the United States on public business may have preference over all private business when the public interest requires such preference. No company shall be required to deliver despatches at a greater distance from the station at which they are received than its published regulations require; and if an applicant direct a despatch to be mailed at the place of delivery, and offer to pay the necessary postage thereon, the company shall affix the necessary postage stamp, and mail the despatch in time for the first mail that departs after such despatch is received at the office of delivery; and for the omission so to do, the company shall be liable to a like penalty as provided in section thirty-four hundred and sixty-two.[1]

§ 343. **Oregon.** — In consideration of the right of way over public property, every telegraph company shall be bound, on application of any officer of this State, or of the United States, in case of any war, insurrection, riot, or other civil commotion or resistance of public authority, for the prevention and punishment of crime, or for the arrest of persons suspected or charged therewith, to give to the communications of such officers immediate despatch, at the price of ordinary communications of the same length; and if any officer, agent, operator, or employee of any such company shall refuse or wilfully omit to transmit such communications as aforesaid, or shall designedly alter or falsify the same, for any purpose whatever, the person so offending shall be liable to indictment, and on conviction may be fined or imprisoned at the discretion of the court.[2]

§ 344. **Pennsylvania.** — The various telegraph companies within the limits of this State are required to receive and

[1] Rev. Stat. (Smith & Benn.), § 3465.

[2] Oreg. Hill's Annot. Laws, § 2000.

forward over their lines all messages that may be offered for transmission by individuals or incorporated companies, provided the parties offering such messages or despatches tender for the transmission thereof the amount of the usual fee for such transmission. And in case of a refusal or neglect on the part of any of the agents of any of the telegraph lines in this State, to send or receive in their regular order, except as hereinbefore excepted, such messages or despatches, the company is liable to a fine of one hundred dollars for each and every message so refused or neglected, to be sued for and recovered before any justice of the peace of this Commonwealth, as debts of like amount are recovered, the one-half of said fine to go to the State, and the other half to the parties suing for the same; and provided further that in any suit to be brought for the recovery of said fine, notice served on the president, director, agent, or either of them, shall be sufficient.[1]

§ 345. **Tennessee.** — In consideration of the right of way over public property, every telegraph company must in the case of war, insurrection, or civil commotion of any kind, and for the arrest of criminals, give immediate despatch at the usual rates of charge to any message connected therewith of any officer of this State or of the United States;[2] and any officer or agent of a telegraph company who fails or refuses to carry out the provisions of this section is guilty of a misdemeanor.[3]

All other messages, including those received from other telegraph companies, must be transmitted in the order of their delivery correctly and without unreasonable delay, and shall be kept strictly confidential.[4]

Any officer or agent of a telegraph company who wilfully violates either of the provisions of this clause is guilty

[1] Bright. Purd. Dig. p. 1629, § 11.
[2] Code, § 1539.
[3] Ib. § 1540.
[4] Ib. § 1541.

of a misdemeanor, and he and the telegraph company or proprietor are also liable in damages to the party aggrieved.[1]

§ 346. **Virginia.** — It is the duty of every telegraph and telephone company doing business in this State to receive despatches from and for other telegraph or telephone companies or lines, and from and for any person, and upon the payment of the usual charges therefor, according to the regulations of the company to transmit the same, faithfully and impartially, and as promptly as practicable, and in the order of delivery to the said company. For every failure to transmit a despatch faithfully and impartially, and for every failure to transmit a despatch as promptly as practicable, or in the order of its delivery to the company, the company shall forfeit the sum of one hundred dollars to the person sending or wishing to send such despatch. But nothing herein shall prevent such company from giving preference to despatches on official business, from or to officers of the United States, or the State of Virginia, or from making arrangements with proprietors or publishers of newspapers, for the transmission to them for publication of intelligence of general and public interest out of its regular order.[2]

It is also the duty of a telegraph or telephone company, upon the arrival of a despatch at the point to which it is to be transmitted by said company, to deliver it promptly to the person to whom it is addressed, where the regulations of the company require such delivery, or to forward it promptly as directed, when the same is to be forwarded. For every failure to deliver or forward a despatch as promptly as practicable, the company shall forfeit one hundred dollars to the person sending the despatch, or to the person to whom it was addressed.

§ 347. **Washington.** — It is the duty of any telegraph com-

[1] Code, § 1542.
[2] Va. Code, § 1291.
[3] Ib. § 1292.

pany doing business in this State to transmit all despatches in the order in which they are received, under the penalty of one hundred dollars, to be recovered with costs of suit, by the person or persons whose despatch is postponed out of its order, provided that communications to and from public officers on official business may have precedence over all other communications; and provided also that intelligence of general and public interest may be transmitted out of its order.[1] In case of the refusal or neglect of any telegraph or telephone company to comply with the provisions of these statutes, the penalty for the same shall be a fine of not more than five hundred nor less than one hundred dollars for each offence.[2]

§ 348. **Wisconsin.** — Any person, association, or corporation operating or owning any telegraph line doing business in this State is liable for all damages occasioned by failure or negligence of their operators, servants, or employees, in receiving, copying, transmitting, or delivering despatches or messages.[3]

§ 349. **Summary.** — There are several main features of importance which may be gathered from a careful study of the foregoing statutes; first, that in almost every instance the order of transmission prescribed by the statute is the order in which the messages are received at the sending office. In a few statutes, however, there are express exceptions to this order in favor, — (*a*) Of messages sent by government officials, or officers of justice in cases of war, riot, or the prevention of crime, or the arrest and punishment of criminals. This exception exists in Arkansas, California, Connecticut, Indiana, Louisiana, Minnesota, Mississippi, Nevada, Ohio, Oregon, Tennessee, Virginia.[4] (*b*) Another exception occurs in some States whereby arrangements may

[1] Hill's Stats. & Codes, § 1551.
[2] Ib. § 1564.
[3] San. & Berr. Ann. Stat. § 1770 b.
[4] See statutes, *supra*, & *post*, § 405.

be made for giving priority of transmission to news of public and general interest intended for publication in newspapers. Such an exception exists in Arkansas, California, Connecticut, Georgia, Indiana, Maryland, Nevada, New York, Ohio, Virginia, and Washington.[1] Second, that in many States the statutes prescribe that the messages shall be transmitted "with good faith and impartiality," while in others no use is made of these words. This phrase is important in view of many decisions of the courts, which will be subsequently examined, in regard to the effect given these statutes when construed by the courts.[2] Third, that in many cases a penalty is imposed for neglect of the duty imposed by the statutes, while in other cases a company is made liable for the actual damages caused by the breach of the statutory duty. This fact has, in effect, divided the actions against telegraph companies into two great classes: first, actions for the penalty; and second, actions for damages. These different species of actions will be discussed at length hereafter.[3] In general, it may be said that the importance of the statutes given above cannot be overestimated in their effect upon the liability of telegraph companies for negligence, as these statutes confer on telegraph companies a public character, which has been heretofore adverted to, which renders them liable for negligence in the transaction of their duties, even to those sustaining no contract relation with the company. This liability depends, it is believed, wholly upon these statutes relating to the telegraph company, for, in England, where such statutes do not exist, the telegraph company is held not liable to any action by a person to whom the message is sent, as will be shown later.[4]

[1] See statutes *supra, passim.*

[2] *Post*, §§ 404–428.

[3] *Post*, cc. xxiv.–xxvi.

[4] *Post*, ch. xxiii.

CHAPTER XVI.

DUTY OF ACCEPTANCE OF MESSAGE.

§ 350. Duty of Company to receive Messages.
351. Obligation confined to Scope of Business.
352. Criminal and Immoral Messages.
353. Gambling Transactions.
354. Transmission of Messages on Sunday.
355. Telegraph Offices may be open on Sunday.
356. Ordinary Business Messages, not to be sent on Sunday.
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359. Messages of Charity and Necessity.
360. Nature of the Necessity.
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§ 362. Messages to Doctors.
363. Messages to Lawyers.
364. What are not Works of Necessity.
365. Sunday Delivery.
366. Necessity caused by Sender's Inadvertence.
367. Burden of Proof.
368. Waiver of Sunday Law.
369. Company may require Written Message.
370. Waiver of Writing.
371. Waiver of requiring Use of Blanks.
372. Pre-payment of Toll.
373. Pre-payment of Answer.
374. Reasonable Rules.

§ 350. **Duty of Company to receive Messages.** — The duty of a telegraph company, as declared in the statutes set forth in the foregoing chapter, as well as arising from the public character of its occupation, is to receive messages from all persons for transmission, without discrimination.[1] There are however, certain limitations to this duty and obligation.[2]

[1] State, Trenton & New Brunswick Turnpike Co. *v.* American & European Commercial News Co., 43 N. J. L. 381, 384; Primrose *v.* Western Union Telegraph Co., 154 U. S. 1, 14; and see statutes *supra*, §§ 320–349.

[2] The company may make reasonable rules as to where messages must be presented for transmission. A regulation often printed upon the blanks of the company, is to the effect that no responsibility regarding messages attaches to the company until the same are presented and accepted at one of its transmitting offices, and if a message is sent to such office by one of the company's messengers, he acts for that purpose as the agent of the

§ 351. **Obligation confined to Scope of Business.** — The telegraph company is only obliged to offer its facilities to the public in that branch of telegraphic business for which it is chartered, and for which it has provided instruments and facilities. It is not obliged, at the request of any individuals or other corporations, to engage in a distinct branch of business which it does not desire to undertake.[1]

§ 352. **Criminal and Immoral Messages.** — The duty of a telegraph company to receive messages from the public does not include criminal or immoral messages or messages which are intended to aid and abet the furtherance of criminal designs or immoral proceedings. Messages of this character a telegraph company has a right to refuse to accept for transmission, and no liability is incurred by such refusal or by failure to transmit after receipt.[2] This principle is embodied in the statutes in Kentucky, Louisiana, Nevada, and New Jersey.[3] It would be the duty of the telegraph company to refuse to receive such despatches if, upon their face, they carried evidence of the purpose for which they are sent; but it is not the duty of the telegraph company to

sender. Such a regulation is a reasonable one, and a person who writes a message upon one of the blanks containing it, and delivers it to a messenger boy of the telegraph company, is bound by it, and if the boy does not present it at the transmitting station for transmission, the telegraph company incurs no liability. Stamey *v.* Western Union Telegraph Co., 18 S. E. Rep. 1008. The telegraph company may, also in proper cases, exercise a discretion as to what office it will receive messages at for transmission. Thus if the company has two offices in the same place, each near the centre of the town, and only about eighty yards apart, from one of which offices a line runs directly to the place of destination of the telegram, while from the other the line is indirect and much longer, the telegraph company may lawfully refuse to receive the message at the office of the longer line, if it states the reason at the time of refusal, and informs the person desiring to send the message of the other office from which it can be sent more directly. Western Union Telegraph Co. *v.* Wilson, 108 Ind. 308.

[1] See *supra*, §§ 291–294.

[2] Western Union Telegraph Co. *v.* Ferguson, 57 Ind. 495.

[3] See statutes, *supra*, §§ 299, 329, 339, 340.

investigate into the purposes or meaning of despatches delivered to it for transmission, and if a message is, in its language, free from profanity or indecency, or evidences of criminal intent, the telegraph company may, and it seems must, in the absence of extrinsic knowledge of the true character of the message, receive it for transmission.[1]

§ 353. **Gambling Transactions.** — A diversity of opinion exists as to whether, if a message in its language bears open reference to transactions in the nature of futures, or similar gambling transactions, the telegraph company which has accepted it for transmission, and received its fee therefor, but has negligently performed its duties, can defend in a suit based on such negligence, by alleging the illegal and immoral character of the message. Thus it has been held that in an action to recover the statutory penalty for a failure to deliver a telegram with due promptness, the fact that the contents of the telegram related to a sale of futures, which was an immoral transaction, but not illegal in the State where the message was sent, was not a bar to the action. In this case the messages were "Shall I draw for more bonus? Answer quick," and "If necessary draw for more bonus." The court distinguishes the case from actions brought on messages transmitted on Sunday,[2] and while approving the principle of Ferguson's case,[3] says that it is not illegal for a telegraph company to receive and transmit messages relating to speculative transactions in futures where that class of business has not been made penal by statute.[4] On the other hand, messages relating to similar transactions have been held to be so far illegal in their nature that a telegraph company is not liable for failure to transmit them.[5]

[1] Western Union Telegraph Co. *v.* Ferguson, 57 Ind. 495; Gray *v.* Western Union Telegraph Co., 87 Ga. 350.

[2] See *post*, §§ 354–368.

[3] *Supra*, § 352.

[4] Gray *v.* Western Union Telegraph Co., 87 Ga. 350.

[5] Bryant *v.* Western Union Telegraph Co., 17 Fed. Rep. 825; Smith *v.* Western Union Telegraph Co., 84 Ky. 664.

§ 354. **Transmission of Messages on Sunday.** — A kindred subject is the transmission of messages on Sunday. In almost all the States of the Union, Sunday is regarded as a day upon which the ordinary occupations of life are to be omitted, and the day set apart as a day upon which no work shall be carried on except of charity and necessity, and as a corollary to this principle contracts made on Sunday are held void, except when they relate to works of charity or necessity. There are also generally statutes prohibiting the carrying on ordinary occupations on Sunday.

§ 355. **Telegraph Offices may be open on Sunday.** — The telegraph business, however, is not an ordinary occupation. It is a public benefit, and is of absolute necessity to the civilized world. Telegraph companies are therefore permitted to keep open their offices for the transmission of messages on Sunday, because there are emergencies requiring that messages be transmitted on that day. It is often of the highest importance and most serious moment that messages should be received and transmitted on Sunday, and in many instances the transmission of a message on Sunday may be necessary to prevent great loss, and even to save life, and therefore the business of telegraphy cannot be brought under the same rules as that of a farmer, mechanic, or merchant.[1] But it is believed that the telegraph company could not be required to keep its offices open on Sunday, nor would it forfeit its franchise by closing its offices on that day.

§ 356. **Ordinary Business Messages not to be sent on Sunday.** — Although a telegraph company may keep its office open on Sunday, yet it cannot be required to send an ordinary business despatch on Sunday, and by refusing to receive or send it, the telegraph company incurs no penalty or liability.[2]

[1] Western Union Telegraph Co. *v.* Yopst, 118 Ind. 251; and see cases *post*, §§ 359–368.

[2] Thompson *v.* Western Union Telegraph Co., 32 Mo. App. 191; Bur-

In the case of Thompson *v.* Western Union Telegraph Company, 32 Mo. App. 191, the facts were that a statute imposed a penalty upon any telegraph operator for not informing a person applying to send a despatch that the line was not in working order, or that despatches already on hand would prevent transmission within the required time, as the case might be. The plaintiff offered a despatch on Sunday evening, and inquired whether it could be sent on that day. The operator said it could; but this information was, in fact, false, for the office of destination was not open on Sunday night, and the despatch was therefore delayed. The court held that the statute only covered cases where application was made for the transmission of a message which could lawfully be transmitted, and therefore the telegraph company did not incur a penalty by the false information above stated, for no application could be said to have been made under the statute.

§ 357. **Contract of Transmission made on Sunday void.** — Even if the telegraph company receives an ordinary business message not of charity or necessity for transmission on Sunday, and is paid its charge therefor, it is generally held that the contract of transmission entered into between the sender and the company is void, since the general rule applies to such transactions, holding all contracts made on Sunday, except when relating to works of charity or necessity, to be void, and the telegraph company incurs no liability on the contract for negligence, error, or delay in transmitting the message.[1] And for the same reason, the telegraph company incurs no liability in tort for error or

nett *v.* Western Union Telegraph Co., 39 Mo. App. 612; Western Union Telegraph Co. *v.* Hutcheson, 91 Ga. 252; Willingham *v.* Western Union Telegraph Co., Ib. 449.

[1] Rogers *v.* Western Union Telegraph Co., 78 Ind. 170; Western Union Telegraph Co. *v.* Yopst, 118 Ind. 248; Western Union Telegraph Co. *v.* Griffin, 1 Ind. App. 50; Western Union Telegraph Co. *v.* Hutcheson, 91 Ga. 252; Willingham *v.* Western Union Telegraph Co., 91 Ga. 449.

delay in transmitting the message, since there is no legal duty upon it to transmit such messages on Sunday.[1] In one or two cases, however, it has been held that if the telegraph company accepts the message for transmission and receives the fee therefor, and then is guilty of negligence in the transmission or delivery of the message, it has waived the defence of the Sunday laws, and can be held liable for its negligence.[2]

§ 358. **Penal Statutes.** — The same rules as to Sunday messages apply to actions to recover penalties under statutes, since in such actions the plaintiff relies either upon a contract formed on Sunday for the transmission of the message, or upon an alleged duty to transmit messages which only extends on Sunday to messages of charity or necessity. In either event, therefore, the plaintiff cannot recover the penalty unless he shows that the telegram was a work of necessity or charity,[3] unless, indeed, by statute, in cases where telegraph companies voluntarily engaging in general business on Sunday are estopped to set up the Sunday laws as a defence.[4]

§ 359. **Messages of Charity and Necessity.** — A large portion of the messages sent over the telegraph lines are, however, messages of such a character as to fall within the exception of the Sunday laws, as being messages of charity and necessity, and as such messages may lawfully be transmitted on Sunday, the contract for such transmission is valid, and the telegraph company may be held liable for its breach on the same principles as are discussed at length in the succeeding chapters.[5] The question whether a message is of such a

[1] Cases *supra*, p. 318, note 1.

[2] Western Union Telegraph Co. *v.* McLaurin, 70 Miss. 26. See *post*, § 368.

[3] Rogers *v.* Western Union Telegraph Co., 78 Ind. 169.

[4] Bassett *v.* Western Union Telegraph Co., 48 Mo. App. 566. See *post*, § 368.

[5] *Post*, cc. xvii. to xxviii.

nature as to be within this exception is for the court, and while the courts will not, as a matter of law, declare that the business of telegraphy as a whole is a work of necessity, nor that all contracts for the transmission of telegraphic messages are to be deemed within the exceptions of the Sunday laws, yet there are many cases in which the sending and delivering of a message is, without question, a work of necessity within the meaning of the statutes. Whether the message in question is within the exception must be determined in each case from the language of the message, as explained by the facts of the case.[1] The court, in deciding whether a message is or is not a message of charity or necessity, is not limited to the message alone, but may examine all the facts relating to the sending of the message.[2] Often the message itself shows from its very language that it is a work of necessity,[3] *e. g.*, "My daughter is very sick. Come at once."[4]

§ 360. **Nature of the Necessity.** — In regard to the characteristics which will render a message so far a work of necessity or charity as lawfully may be sent on Sunday, there need not be an absolute or physical necessity, but a moral fitness or propriety of the work or labor done, under the circumstances of any particular case.[5] Thus it has been held that a message which is necessary to prevent serious loss or to protect property may lawfully be sent on Sunday.[6] So it has been said that messages designed to relieve suffering, avert harm, and prevent serious loss are messages of charity or necessity.[7] In another case it was said there may be such a thing as "social necessity."[8]

[1] Rogers *v.* Western Union Telegraph Co., 78 Ind. 169. [2] Ibid.

[3] Western Union Telegraph Co. *v.* Griffin, 1 Ind. App. 50.

[4] See *post*, § 361.

[5] Burnett *v.* Western Union Telegraph Co., 39 Mo. App. 613; Flagg *v.* Millbury, 4 Cush. 243; Western Union Telegraph Co. *v.* Yopst, 118 Ind. 248; Western Union Telegraph Co. *v.* McLaurin, 70 Miss. 31.

[6] Western Union Telegraph Co. *v.* Yopst, 118 Ind. 248.

[7] Ibid.

[8] Western Union Telegraph Co. *v.* McLaurin, 70 Miss. 31.

§ 361. **Messages relating to Sickness and Death are Messages of Charity or Necessity.** — It is uniformly held that any telegraphic message relating to or concerning the illness or death of any person in whom either party to the telegram is interested by relationship or friendship, is a work of charity and necessity within the exception of the Sunday laws.[1] Thus a message relating to the burial of one's wife is a message of necessity, and as such can be sent on Sunday.[2]

In the case last cited it appeared that the plaintiff's wife and child both died, and that the plaintiff, being in straitened circumstances among strangers, and in need of pecuniary assistance about the funeral obsequies of his wife, and desirous of removing the corpse to a different place for interment, and requiring the assistance of his father for this purpose, and also desiring the help and comfort of his wife's mother, both living in a town at some distance, delivered to the telegraph company a message addressed to the father summoning them to his assistance. The day on which the telegram was delivered to the company was Sunday, and the message was transmitted to the town where the addressee lived, but the only effort made by the messenger of the telegraph company to deliver it was to go three times to the place of business of the plaintiff's father. No effort was made to deliver it at his residence, although he was there most of the day. The court in an action by the sender of the message said that the message was necessary to secure decent interment for the deceased wife and the presence of the relatives, and that the jury should have been instructed that a contract to do things necessary to such an end was a contract to do a work of charity and necessity, and therefore valid.[3] So also a telegraphic message informing a son that his father was dead, and requesting the son to come home, is

[1] Western Union Telegraph Co. *v.* Wilson, 93 Ala. 32.
[2] Gulf, Colorado & Santa Fe Ry. Co. *v.* Levy, 59 Tex. 542.
[3] Ibid.

such a work of necessity as renders the contract for transmitting valid, though made on Sunday.[1]

So a message sent by one to allay the anxiety which might be caused to his wife by an absence from home beyond the time he had appointed, is a work of necessity or charity, and such a message may legally be sent on Sunday if the telegraph office is open on that day.[2]

§ 362. **Messages to Doctors.** — Owing to the importance of securing medical advice and assistance in cases of illness, it is universally held that messages to and from doctors relating to the rendering of professional services, are messages of necessity which may be transmitted even on Sunday.[3]

§ 363. **Messages to Lawyers.** — There does not seem to be as much uniformity in regard to messages to attorneys. The facts of each case must be investigated, and the court will say whether, as a matter of law, the emergency was sufficient to render the message a message of charity or necessity.

In one case where a message was sent on Sunday to get counsel to defend a homicide, and the message was not delivered, and the attorney, thus losing his employment, brought suit to recover the fees to which he would have been entitled had he been employed, the court held that the message was a message of necessity, and the plaintiff might recover.[4] In this case the message was "Metcalf has killed Dwyer. Come on first train. Good fee for defence." The court held that the necessity might be either that of the sender or of the sendee. In this case, however, the court placed the recovery upon the ground that, the telegraph company having accepted the message for transmission and transmitted it, the negligence being in the delivery, the company had waived the defence of the Sunday laws.[5]

[1] Western Union Telegraph Co. *v.* Wilson, 93 Ala. 32.
[2] Burnett *v.* Western Union Telegraph Co., 39 Mo. App. 612.
[3] Western Union Telegraph Co. *v.* Griffin, 1 Ind. App. 46.
[4] Western Union Telegraph Co. *v.* McLaurin, 70 Miss. 26.
[5] Ibid.

§ 364. **What are not Works of Necessity.** — An ordinary business message, even though it may relate to important matters, is not necessarily a work of necessity.[1]

For instance, the following message, "Bring $40 if you want report," was held not to be a message of charity or necessity, it being shown that it was merely a message from a stenographer notifying counsel that a typewritten report of a case had been copied out, and was ready for them if they desired it, and that the report had been ready for some time previously, during which time a message could just as well have been sent.[2]

Where the message was "Come up in the morning. Bring all," the court held that it could not, as a matter of judicial construction, say that this message was one of necessity or charity. On its face it appeared to be merely a friendly invitation, and if there were facts showing that it was a message of necessity or charity, these facts should have been shown by the plaintiff.[3]

A message from a son to his mother, stating that he and a friend will be at home to dinner on Sunday, is not a work of charity or necessity,[4] and the action may be dismissed on demurrer if the character of the message appears on the declaration.[5]

§ 365. **Sunday Delivery.** — If the message is one of charity or necessity, and the company receives it for transmission, it is not excused from delivery on Sunday by the fact that the sendee had notified the company not to deliver telegrams at his house on Sunday.[6]

§ 366. **Necessity caused by Sender's Inadvertence.** — Though the necessity for sending the telegram on Sunday may have

[1] Thompson *v.* Western Union Telegraph Co., 32 Mo. App. 191.
[2] Western Union Telegraph Co. *v.* Yopst, 118 Ind. 248.
[3] Rogers *v.* Western Union Telegraph Co., 78 Ind. 169.
[4] Western Union Telegraph Co. *v.* Hutcheson, 91 Ga. 252.
[5] Willingham *v.* Western Union Telegraph Co., 91 Ga. 449.
[6] Brashears *v.* Western Union Telegraph Co., 45 Mo. App. 444.

been caused by a lack of perception, or even prior negligence on the part of the person sending it, who might, by foresight, have sent it on Saturday, yet this fact will not render the message less one of necessity, for the moral necessity may exist, although it is produced by the sender's own acts.[1]

§ 367. **Burden of Proof.** — The question, on whom the burden of proof lies of showing that the message is within the exceptions to the Sunday laws, has been discussed in several cases, but the result is not very satisfactory. The leading principle seems to be that the plaintiff suing a telegraph company for negligence must allege and prove all the facts which are necessary to make out his case, and that if the statement of the day on which the message was delivered to the telegraph company for transmission is a part of his case as identifying the message, or otherwise, he must, if this day was Sunday, show that the message was a work of charity or necessity.[2] If, however, the message by its very language shows that it was a work of necessity or charity, this is sufficient to throw the burden of proof upon the defendant to excuse its negligence.[3] Moreover, if, as in some States,[4] the statutes provide that any person or corporation which voluntarily engages in business on Sunday cannot defend actions of negligence by interposing the Sunday laws; then if the plaintiff alleges a delivery of the message on Sunday for transmission, and also inserts allegations showing that the company was voluntarily engaging in business on that day, this makes out a *prima facie* case, and it is incumbent upon the telegraph company to show that it was doing busi-

[1] Burnett *v.* Western Union Telegraph Co., 39 Mo. App. 612.

[2] Bassett *v.* Western Union Telegraph Co., 48 Mo. App. 566; Western Union Telegraph Co. *v.* Yopst, 118 Ind. 248; Rogers *v.* Western Union Telegraph Co., 78 Ind. 169; Western Union Telegraph Co. *v.* Griffin, 1 Ind. App. 50; Western Union Telegraph Co. *v.* Wilson, 93 Ala. 32.

[3] Western Union Telegraph Co. *v.* Wilson, 93 Ala. 32.

[4] See *post*, § 368.

ness only in the transmission of messages of charity and necessity.[1] In any event, the plaintiff must show that the telegraph company knew that the sending of the message was a work of charity or necessity. It may gain this information either from the language of the message or from facts stated to it at the time of the delivery of the message to it for transmission.[2]

§ 368. **Waiver of Sunday Law.** — The view is advanced by a few cases that if a telegraph company accepts a message on Sunday for transmission, and takes pay therefor, it cannot under these circumstances be heard to say, in defence of its own negligence in transmitting the message, that it ought not to have taken it for transmission because it was offered on Sunday, for such a defence would in effect be alleging its own wrong-doing in one respect as a defence for its own wrong-doing in another, and cannot be a valid defence;[3] but this view is not in accordance with the majority of the decisions, and is not on principle correct, for the Sunday laws are not intended as a personal privilege, but for the good of the whole community.[4] In some States, however, by statute, persons or corporations engaging voluntarily in general business on Sunday are prevented from setting up the defence of the Sunday laws.[5] But a telegraph company by keeping its office open on Sunday does not necessarily engage in a general telegraphing business on that day. It may be open only for messages of charity or necessity,[6] but *prima facie* it is open for general business.

§ 369. **Company may require Written Message.** — Although a telegraph company is bound to accept messages from all

[1] Bassett *v.* Western Union Telegraph Co., 48 Mo. App. 568.

[2] Western Union Telegraph Co. *v.* Griffin, 1 Ind. App. 50.

[3] Burnett *v.* Western Union Telegraph Co., 39 Mo. App. 615; Western Union Telegraph Co. *v.* McLaurin, 70 Miss. 26.

[4] See *ante*, § 357.

[5] Bassett *v.* Western Union Telegraph Co., 48 Mo. App. 569.

[6] Ibid.

the public without discrimination, for transmission over its lines, yet it may make reasonable regulations for the conduct of its business, and for its own protection, and as one of these it may require that the messages which are presented to it for transmission shall be in writing, and even that they shall be written upon the blank printed forms furnished by the company for this purpose, and containing restrictions and stipulations concerning the liability of the company.[1] And such a regulation is generally prevalent in the business of all telegraph companies at the present day.

§ 370. **Waiver of Writing.** — The telegraph company, however, may, by its dealings with a customer, so act as to be estopped from defending a suit on the ground that its regulation as to writing was not complied with.[2] Thus if the telegraph company, at any particular office, establishes the custom of receiving oral messages, and does its business by this method, it will be held to its usual liability as if the message had been in writing.[3] So, if a telegraph company, in its dealings with a particular customer, habitually receives from him oral messages, it cannot defend a suit brought for its negligence in transmitting a message on the ground that the message was not in writing, nor can it, in such a case, set up the stipulations which are contained in its printed blanks, and which are known to the customer, if, as a matter of fact, the jury find that the dealings of the parties consti-

[1] Western Union Telegraph Co. *v.* Dozier, 67 Miss. 288; Primrose *v.* Western Union Telegraph Co., 154 U. S. 1, 14.

[2] Western Union Telegraph Co. *v.* Dozier, 67 Miss. 288; Western Union Telegraph Co. *v.* Stevenson, 128 Pa. St. 442.

[3] Western Union Telegraph Co. *v.* Dozier, 67 Miss. 288; Texas Telegraph & Telephone Co. *v.* Seiders, 29 S. W. Rep. 258. Cf. Southwestern Telegraph & Telephone Co. *v.* Dale, 27 S. W. Rep. 1059. And it would seem that accepting a message orally for transmission, and receiving pay therefor, would bind the company to transmit the message with due care, even though the rules of the company forbid operators to waive any rules. See *post*, § 371.

tute a waiver of these stipulations.[1] Thus in the case cited the facts were that the plaintiff company had an arrangement with the defendant for sending his telegraphic messages relating to the oil market. The defendant was a heavy operator in oil, and bought and sold through his agents in New York, Chicago, and other places, and for this purpose found it necessary to send numerous despatches. The plaintiff's office was in the Oil Exchange Building, and defendant established an office in the same building outside of the room of the Oil Exchange. The defendant was accustomed to send his messages to plaintiff company's operator by a messenger boy, who took them out of the Oil Exchange room, and delivered them to the operator in the room adjoining. In order to obviate the inconvenience of having a messenger boy running to and fro between the offices, the telegraph company put a speaking tube from its operators' room in the oil exchange, and the defendant used this for the transmission of his messages. A large bill for these messages having been incurred by the defendant, the plaintiff company requested him to settle it, but he claimed a set-off of damages incurred by him by reason of erroneous transmission of two messages by plaintiff's operators. The plaintiff company refused to allow him this reduction, claiming that he was familiar with the printed regulations on the blank form of telegram, and was, therefore, bound by knowledge of the regulations, one of which was that unrepeated messages were sent liable to any errors, and the company should not be responsible for them. The court held that the repeating regulation in the telegraph blanks was a reasonable one, and bound a sender of messages if he was acquainted with it, but that in this case the service given by the plaintiff company to the defendant was of so unusual a character, and so different from the ordinary sending of telegraph messages, that the jury might fairly infer that the telegraph company had

[1] Western Union Telegraph Co. *v.* Stevenson, 128 Pa. St. 442.

waived its right to rely upon the regulations which governed it as to ordinary sending of telegrams on the printed blanks, and that from its establishing a speaking tube and receiving messages orally, such an inference might be drawn by the jury, and as they had found in favor of the defendant in his claim for set-off, the court must assume that this was the case.

§ 371. **Waiver of requiring Use of Blanks.** — Although a telegraph company may have a rule that messages must be written upon its blank printed forms, yet if the message is received by the operator on an ordinary piece of paper from a person not knowing of this rule, and the charges for transmission are paid, the company will be responsible for duly transmitting the same, even though by its rules its operators are forbidden to waive any of its regulations or stipulations.[1] The effect of receiving messages on ordinary paper or orally, so far as it concerns the validity of the regulations of the telegraph company, will be considered later.[2]

§ 372. **Pre-payment of Toll.** — Another condition precedent which a telegraph company may require of every person offering it a message for transmission is the payment or tender of the usual rates for the transmission of such messages. This is in many States, by statute, made a condition precedent to the inception of the ordinary duties of a telegraph company as to the transmission and delivery of a telegram.[3] But even where this condition is not expressly enacted by

[1] Beasley *v.* Western Union Telegraph Co., 39 Fed. Rep. 181; Western Union Telegraph Co. *v.* Jones, 69 Miss. 658; Western Union Telegraph Co. *v.* Arwine, 3 Tex. Civ. App. 156; Western Union Telegraph Co. *v.* Hinkle, 3 Tex. Civ. Ap. 518; Western Union Telegraph Co. *v.* Shumate, 2 Tex. Civ. App. 429.

[2] *Post*, § 496.

[3] Connecticut, Georgia, Indiana, Louisiana, Michigan, Missouri, New York, Pennsylvania, Virginia, Wisconsin. See statutes. *supra*, §§ 320–349; Western Union Telegraph Co. *v.* Ryals, 21 S. E. Rep. 573.

statute, it is implied by the law, for the duty of the telegraph company, as engaged in a public occupation, is to serve the public only upon receipt of its reasonable compensation therefor.

§ 373. **Pre-payment of Answer.** — For the same reasons, a telegraph company may require the deposit of a sum sufficient to pay for a reasonable answer in cases where the original message asks an answer.

For instance, one regulation of the telegraph company often is that transient persons sending messages which require answers must deposit in advance an amount sufficient to pay for an answer of ten words. This rule has been held to be a reasonable one in two cases, and to bind the sender if brought to his knowledge.[1] The regulation was upheld in the Indiana case, because a person who sends another a message, and asks an answer, promises by fair and just implication to pay for transmitting the answer. It is fairly inferable that the sender who asks an answer to his message will not impose upon the person from whom he requests an answer, the burden of paying the expense of its transmission. The telegraph company has a right to proceed upon this natural inference, and to take reasonable measures for securing legal compensation for its services. In the case in the Federal court, however, the judge did not agree with this view of the case, but thought the regulation might be sustained because, taken in connection with other regulations of tolls by telegraph company, it makes a carefully devised system of securing the payment of tolls, consistently with an enlarged accommodation of the public, in allowing customers to regulate among themselves this very matter of adjusting the burden of the tolls.

§ 374. **Reasonable Rules.** — In general, it may be said that telegraph companies are allowed to make reasonable rules

[1] Hewlett *v.* Western Union Telegraph Co., 28 Fed. Rep. 181; Western Union Telegraph Co. *v.* McGuire, 104 Ind. 130.

and regulations for the conduct of their business.[1] Some of these have already been adverted to, such as rules requiring messages to be written,[2] requiring pre-payment of charges.[3] The most important set of rules and regulations, so far as concerns the operation of telegraph lines, are those which are generally printed upon the blank forms of the telegraph company for the transmission of messages. These rules and regulations comprise limitations of the company's liability in case of non-repeated messages; rules as to insurance of messages, as to the liability of the company in case of connecting lines, as to the delivery of messages, and as to the time within which claims for damages must be presented. As these rules and regulations form a part of the contract between the telegraph company and the sender of the message, they will be considered at length in discussing the special contract stipulations in a later chapter.[4]

[1] Western Union Telegraph Co. *v.* Reynolds, 77 Va. 173; Schwartz *v.* Atlantic & Pacific Telegraph Co., 18 Hun, 157; Telegraph Co. *v.* Griswold, 37 Oh. St. 301; Shepard *v.* Gold & Stock Telegraph Co., 38 Hun, 338; Atlantic & Pacific Telegraph Co. *v.* Western Union Telegraph Co., 4 Daly, 527; Western Union Telegraph Co. *v.* McGuire, 104 Ind. 130; Hewlett *v.* Western Union Telegraph Co., 28 Fed. Rep. 181; Stamey *v.* Western Union Telegraph Co., 18 S. E. Rep. 1008; Commonwealth *v.* Western Union Telegraph Co., 14 Week. Not. Cas. 535. Cf. *supra*, §§ 289, 292, 293. A rule of the telegraph company not to receive telegrams at time of a general strike of its operators, unless marked "Accepted subject to mailing and other delays," has been held to be a reasonable regulation. Commonwealth *v.* Western Union Telegraph Co., 14 Week. Not. Cas. 535.

[2] *Supra*, § 369.

[3] *Supra*, §§ 372, 373.

[4] *Post*, cc. xxv., xxvi.

CHAPTER XVII.

OBLIGATION OF TELEGRAPH COMPANY TO USE REASONABLE CARE.

§ 375. Nature of the Duty.
376. Twofold Basis of the Duty and Liability.
377. Telegraph Company not liable as Insurer or Common Carrier.
378. Origin of the Insuring View.
379. Difference between Telegraph Company and Common Carrier.
380. Telegraph Company bound to use Reasonable Care.
381. Correlated Expressions.
382. "Great Care."
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§ 384. "Reasonable Care."
385. Gross Negligence.
386. Practical Importance of the Phrase.
387. Instances of Gross Negligence.
388. Same Subject (*continued*).
389. Same Subject (*continued*).
390. Same Subject (*continued*).
391. Same Subject (*continued*).
392. Different Distinctions suggested.
393. Tendency to abolish Distinction.
394. Gross Negligence is for the Jury.
395. Evidence on this Point.

§ 375. **Nature of the Duty.** — The telegraph company, as has been seen, is obliged by the nature of its employment and by express statutory provisions in many States, to transmit and deliver messages for the public.[1] The question then arises, What duty as to transmission does this lay upon the company? Is its duty an absolute one, to transmit and deliver with safety, accuracy, and promptness, as would be the duty of a common carrier in regard to goods intrusted to it; that is, does the telegraph company insure the accurate and prompt delivery of the message, or is the telegraph company only bound to use reasonable care in the transmission and delivery of the message, and if so, what is reasonable care, and are there any degrees of care? The consideration of these questions in the decided cases is complicated by the different views of the courts as to the real basis of the liability of telegraph companies, and still further by the fact

[1] *Supra*, cc. xiv., xv., xvi.

that in most cases the question is not presented in its simple form, but involved with the consideration of various special stipulations and agreements contained in the telegraph blanks on which the messages are usually written. A short examination of the basis of the liability of the telegraph companies in this respect will be advantageous here, although its full consideration will be deferred to a later chapter.[1]

§ 376. **Twofold Basis of the Duty and Liability.** — The duty of the telegraph in regard to the transmission of messages has a twofold basis. First, an obligation arising out of the agreement to transmit, entered into between the sender and the company when the message is delivered to the latter for transmission and the fees are paid;[2] and second, an antecedent obligation based upon the public character of the employment of the company and the statutes in regard to transmission.[3] This twofold basis of the obligation and duty of transmission has given rise to several important distinctions in regard to suits against telegraph companies for negligence in transmission, but viewed in either light, the same question is raised, *i. e.*, is the obligation an absolute one like that of a common carrier or insurer, or is it only such an obligation as is imposed on any company which is granted the privilege of exercising public franchises; *i. e.*, the obligation to use due care in transmission and delivery.[4]

§ 377. **Telegraph Company not liable as Insurer or Common Carrier.** — It has already been seen[5] that the courts, after some hesitation on this subject, have agreed that the telegraph company does not, so far as its operations are concerned, occupy the same legal position as the common

[1] *Post*, ch. xxiii.

[2] See cases, *post*, §§ 452–457.

[3] Passmore *v.* Western Union Telegraph Co., 78 Pa. St. 242, and see cases, *post*, §§ 458, 459.

[4] Passmore *v.* Western Union Telegraph Co., 78 Pa. St. 242; Ayer *v.* Western Union Telegraph Co., 79 Me. 497; Telegraph Co. *v.* Griswold, 37 Oh. St. 301.

[5] *Supra*, §§ 7–10.

carrier, and the corollary to that position may now be stated, *i. e.*, that the telegraph company is not, in the absence of special agreement, an insurer of the safe transmission and delivery of the message, *i. e.*, it is not bound at all hazards to see that the message is sent correctly and with due despatch, unless prevented by the act of God or the public enemies.[1]

There were a few early cases in which telegraph companies were held to the strict liability of insurers, like common carriers; that is, it was held that telegraph companies insured the safe transmission and delivery of the messages, and were liable for any damages caused by error or delay in the transmission of the message, unless arising from the act of God or the public enemies.[2]

[1] Fowler *v.* Western Union Telegraph Co., 80 Me. 381, 387; Ayer *v.* Western Union Telegraph Co., 79 Me. 493, 497; New York & Washington Printing Telegraph Co. *v.* Dryburg, 35 Pa. St. 298; Grinnell *v.* Western Union Telegraph Co., 113 Mass. 299; Ellis *v.* American Telegraph Co., 13 Allen, 226, 232; Telegraph Co. *v.* Griswold, 37 Oh. St. 301; Leonard *v.* New York, etc. Telegraph Co., 41 N. Y. 544, 571; Baldwin *v.* United States Telegraph Co., 45 N. Y. 744, 751; Breese *v.* United States Telegraph Co., 48 N. Y. 132, 140; Kiley *v.* Western Union Telegraph Co., 109 N. Y. 231; Pearsall *v.* Western Union Telegraph Co., 124 N. Y. 256, 268; Gillis *v.* Western Union Telegraph Co., 61 Vt. 461, 464; Marr *v.* Western Union Telegraph Co., 85 Tenn. 530, 536; Western Union Telegraph Co. *v.* Fontaine, 58 Ga. 433; Pinckney *v.* Western Union Telegraph Co., 19 S. C. 71; Tyler *v.* Western Union Telegraph Co., 60 Ill. 421, 427; Western Union Telegraph Co. *v.* Tyler, 74 Ill. 168; Smith *v.* Western Union Telegraph Co., 83 Ky. 104; Western Union Telegraph Co. *v.* Neill, 57 Tex. 283; Western Union Telegraph Co. *v.* Edsall, 63 Tex. 668; Abraham *v.* Western Union Telegraph Co., 23 Fed. Rep. 315 (Oregon); Little Rock & Fort Smith Telegraph Co. *v.* Davis, 41 Ark. 83.

[2] Bowen *v.* Lake Erie Telegraph Co., 1 Am. L. Reg. 685; MacAndrew *v.* Electric Telegraph Co., 17 C. B. 3; Parks *v.* Alta California Telegraph Co., 13 Cal. 423.

The Supreme Court of Virginia, also, in one of its earlier cases on this subject, seemed to be somewhat inclined to adopt the common carrier theory of the liability of telegraph companies, *i. e.*, as insurers. The court says: —

"While it seems from an examination of many decisions, that the

§ 378. **Origin of Insuring View.** — The contention that a telegraph company is liable as an insurer of the messages arose from the analogy between telegraph companies and common carriers. This analogy, springing from the public nature of both occupations, is very exact in many points, *e. g.*, as to duties of both to serve the public without discrimination, and for regular prices, and in several other respects. The analogy was urged upon the courts almost from the introduction of the telegraph, but, as has been said, the courts have with great unanimity rejected the deductions sought to be drawn therefrom as to the duty of transmitting messages, and have held that in this regard the telegraph company is not in a position analogous to that of a common carrier to the goods intrusted to it for transportation.[1]

§ 379. **Difference between Telegraph Company and Common Carrier.** — The great and radical difference between the two modes of transacting business cause this difference in liability. The common carrier, either by himself or his agents, goes along with the goods, and is present with them at all stages of the route, and can see what happens to them, and guard them from theft and other dangers. The telegraph

weight of judicial opinion is that telegraph companies are not common carriers, in the strict sense of the term, yet on account of the public nature of their employment they have been held in very many cases to a very similar degree of responsibility." Western Union Telegraph Co. *v.* Reynolds, 77 Va. 173. But as the court further defines their duty to be, to have suitable instruments and competent servants, and see that the service rendered to applicants is rendered with the care and skill which its peculiar nature requires (Ibid.), it is evident that the decision means only that the telegraph company is liable for negligence.

In a case in South Carolina, the court discussed the question whether a telegraph company is liable like an insurer for all errors in transmission and delivery except those caused by acts of God and the public enemy, or whether it was enough for the company to show that it had used due care, and the court held that it is enough for the telegraph company to show due care; it is not bound to go further and show that the error was caused by the act of God or the public enemy. Pinckney *v.* Western Union Telegraph Co., 19 S. C. 71

[1] See cases, *supra*, §§ 7–10.

company cannot accompany the message in the course of transmission, nor can it maintain actual practical custody of the line along its whole length, and therefore cannot foresee and avoid the casualties and delays which may alter or retard the message in its transit.[1] Moreover, the common carrier has intrusted to him valuable property, which, from his opportunities during transportation, he or his servants may readily steal or injure or otherwise damage, and therefore for reasons of public policy he is held as an insurer, whereas the telegraph company has nothing of intrinsic value deposited with it, but is merely given certain words, and required to cause similar words to be communicated to the sendee.[2] The analogy of the telegraph company to a common carrier is therefore not perfect, and the reasons which demand the strict accountability of one do not apply to the other. Moreover the delicacy of the instruments employed by the telegraph company, and the likelihood of electrical disturbances over which the company has no control, and the causes of which cannot be foreseen, furnish additional reasons for not imposing on the company the strict liability of an insurer of the safe transmission and delivery of the message.[3] Even in California, where the insuring view was originally held, it has since been changed by statute.[4]

§ 380. **Telegraph Company bound to use Reasonable Care.** — Although, as has just been seen, the courts are now practically uniform in holding that a telegraph company is not liable as an insurer of the safe transmission and delivery of a message, yet the courts have also with practical unanimity held and now hold that a telegraph company is, at common

[1] Birney *v.* New York & Washington Printing Telegraph Co., 18 Md. 341.

[2] Marr *v.* Western Union Telegraph Co., 85 Tenn. 530, and see *ante*, §§ 7-10.

[3] Birney *v.* New York & Washington Printing Telegraph Co., 18 Ind. 341, and see cases, *supra*, § 377.

[4] Hart *v.* Western Union Telegraph Co., 66 Cal. 579.

law and in the absence of contract stipulations varying this obligation, bound to use reasonable care in the transmission and delivery of messages, and will be liable for negligence therein.[1] This rule is in harmony with the rule that telegraph companies are bound to use reasonable care in the construction and maintenance of their lines and apparatus,[2] and with the rule that persons engaging in a public employment are bound to use reasonable care and skill therein.[3] Whether and how far a telegraph company can limit or avoid this obligation by contract stipulations with its customers has been differently decided in different States, and will be considered later.[4]

§ 381. **Correlated Expressions.** — The courts, in defining the obligations of telegraph companies as to transmission and

[1] Ellis *v.* American Telegraph Co., 13 Allen, 226; Redpath *v.* Western Union Telegraph Co., 112 Mass. 71; Grinnell *v.* Western Union Telegraph Co., 113 Mass. 299; Tyler *v.* Western Union Telegraph Co., 60 Ill. 421; Western Union Telegraph Co. *v.* Harris, 19 Ill. App. 317; Western Union Telegraph Co. *v.* Tyler, 74 Ill. 168; Western Union Telegraph Co. *v.* Carew, 15 Mich. 525; New York & Washington Printing Telegraph Co. *v.* Dryburg, 35 Pa. St. 298; Passmore *v.* Western Union Telegraph Co., 78 Pa. St. 242; Rittenhouse *v.* Independent Line of Telegraph, 44 N. Y. 263; Elwood *v.* Western Union Telegraph Co., 45 N. Y. 549; Baldwin *v.* United States Telegraph Co., 45 N. Y. 744; Breese *v.* United States Telegraph Co., 48 N. Y. 132; Pearsall *v.* Western Union Telegraph Co., 124 N. Y. 256; Birney *v.* New York & Washington Printing Telegraph Co., 18 Md. 341; United States Telegraph Co. *v.* Gildersleve, 29 Md. 232; Sweatland *v.* Illinois & Mississippi Telegraph Co., 27 Ia. 433; Manville *v.* Western Union Telegraph Co., 37 Ia. 214; Smith *v.* Western Union Telegraph Co., 83 Ky. 104; Gillis *v.* Western Union Telegraph Co., 61 Vt. 461; Fowler *v.* Western Union Telegraph Co., 80 Me. 381; Bartlett *v.* Western Union Telegraph Co., 62 Me. 209; Hibbard *v.* Western Union Telegraph Co., 33 Wis. 558, 565; Western Union Telegraph Co. *v.* Neill, 57 Tex. 283; Little Rock & Fort Smith Telegraph Co. *v.* Davis, 41 Ark. 83; Western Union Telegraph Co. *v.* Meek, 49 Ind. 53; Becker *v.* Western Union Telegraph Co., 11 Neb. 87; Western Union Telegraph Co. *v.* Fontaine, 58 Ga. 433.

[2] *Supra*, §§ 235–237, 247–257.

[3] Passmore *v.* Western Union Telegraph Co., 78 Pa. St. 242; Telegraph Co. *v.* Griswold, 37 Oh. St. 301.

[4] See *infra*, §§ 509 *et seq.*

delivery, do not always use the phrase "reasonable care," but sometimes use qualified expressions. These may be divided broadly into two classes; first, those in which the word "care" is qualified by an adjective expressing a high degree of care; second, those in which it is qualified by an adjective expressing a moderate degree of care.

§ 382. "Great Care." — There are many decisions in which the care which a telegraph company is bound to exercise in the transmission and delivery of messages is said to be "the highest degree of diligence and skill," "great care," or "a high, — perhaps the very highest degree of care."[1] The courts have been led to use these and similar expressions by the great importance of securing accuracy and diligence in the transmission of telegraphic messages. The use of the telegraph in the most important affairs of the business and social world, and its necessity in cases demanding speedy transmission of intelligence at critical junctures, have, in the opinion of these courts, rendered it necessary to hold telegraph companies to a very strict accountability in the exercise of their corporate functions, and the judges have, therefore, used the expressions above stated in describing the duty of the telegraph company in carrying on its business.[2] They have not, however, given any definite explanation of what they mean by these stringent qualifying words, and it would perhaps be as difficult to distinguish clearly between extreme care and ordinary care, as the courts have said it to be to distinguish between negligence and gross negligence, as will be seen hereafter.[3] There is no doubt, however, that practically the addition of the word "extreme,"

[1] Tyler *v.* Western Union Telegraph Co., 60 Ill. 421, 428; Hart *v.* Western Union Telegraph Co., 66 Cal. 579; Marr *v.* Western Union Telegraph Co., 85 Tenn. 538; Fowler *v.* Western Union Telegraph Co., 80 Me. 381; Western Union Telegraph Co. *v.* Carew, 15 Mich. 525, 533.

[2] Fowler *v.* Western Union Telegraph Co., 80 Me. 381; Bartlett *v.* Western Union Telegraph Co., 62 Me. 209.

[3] See *infra*, §§ 385 *et seq.*

or similar expression in the charge of a judge to the jury would add a measure of strictness to the view which the jury would take of the obligation of the telegraph company, and would, therefore, have a real, though indistinguishable, weight in fixing the obligations of telegraph companies in the conduct of their business, and therefore cannot properly be used. The real measure of the obligation of the telegraph company is, as will be shown in discussing the phrase "due care," that the care must be such as a reasonable and prudent man would exercise under all the circumstances, and must be proportionate to the importance of the message, and that great importance of the message must necessarily add to the care which a prudent man would give its transmission, and the question whether in any particular case the telegraph company has given the requisite amount of care is for the jury to decide.[1]

§ 383. "Ordinary Care." — In many cases the courts hold that a telegraph company is only bound to use "ordinary care" in the transmission and delivery of messages. Several equivalent phrases are used by the courts, such as "due care," simply "care," "diligence," "due diligence," "proper skill and care," "reasonable care and diligence" or "care reasonably adequate to the performance of their duties."[2]

[1] See *infra*, §§ 394, 409, and compare *post*, §§ 721 *et seq.*, 737, 738, 739, *et seq.*

[2] Ellis *v.* American Telegraph Co., 13 Allen, 226; Grinnell *v.* Western Union Telegraph Co., 113 Mass. 299; Gillis *v.* Western Union Telegraph Co., 61 Vt. 461; Western Union Telegraph Co. *v.* Harris, 19 Ill. App. 347; Western Union Telegraph Co. *v.* Tyler, 74 Ill. 168; Western Union Telegraph Co. *v.* Neill, 57 Tex. 283; Western Union Telegraph Co. *v.* Edsall, 63 Tex. 668; Manville *v.* Western Union Telegraph Co., 37 Ia. 214; Washington, etc. Telegraph Co. *v.* Hobson, 15 Gratt. 122; Smith *v.* Western Union Telegraph Co., 83 Ky. 104; Pearsall *v.* Western Union Telegraph Co., 124 N. Y. 256; Abraham *v.* Western Union Telegraph Co., 23 Fed. Rep. 315 (Oregon); Thompson *v.* Western Union Telegraph Co., 64 Wis. 531; Little Rock & Fort Smith Telegraph Co. *v.* Davis, 41 Ark. 83; Western Union Telegraph Co. *v.* Short, 53 Ark. 438; Passmore *v.* Western Union Telegraph Co., 78 Pa. St. 242.

Of these phrases "ordinary care" must be disapproved, as tending to render less distinct in the minds of the jury the obligation of the defendant company, for the adjective "ordinary" has a certain association with matters of trivial importance, and while if it is explained as meaning the "ordinary" care which a person would give to important transactions, it might not be misleading, yet even then it is clumsy and not very applicable. The word "care" or "diligence" without qualifying adjectives is also inadmissible, as leaving too much to the discretion of the jury. "Adequate" care is not objectionable in meaning, but as the word is not a familiar one, it may miss its mark unless carefully explained to the jury.

§ 384. **"Reasonable Care."** — The best phrase to describe the care which a telegraph company is bound to use in the transmission and delivery of messages is the phrase "reasonable care." This phrase means such care as a reasonable and prudent man would use in similar occupations, having in view in each case the various circumstances surrounding the transaction. The degree of care necessary, therefore, may vary with the varied importance of the messages transmitted, and although the varying importance of the messages may not be known in all cases to the telegraph company, yet this knowledge is a factor in determining the amount of care required.[1]

§ 385. **Gross Negligence.** — A distinction has been drawn by the courts in discussing the care or diligence which the telegraph company is required to employ in the transmission and delivery of messages, between want of ordinary care, *i. e.*, negligence, and great want of care, or what is termed "gross negligence." This distinction between gross negligence and

[1] Fowler *v.* Western Union Telegraph Co., 80 Me. 381; Bartlett *v.* Western Union Telegraph Co., 62 Me. 209; Smith *v.* Western Union Telegraph Co., 83 Ky. 104; Telegraph Co. *v.* Griswold, 37 Oh. St. 301; Rittenhouse *v.* Independent Line of Telegraph, 44 N. Y. 263; New York & Washington Printing Telegraph Co. *v.* Dryburg, 35 Pa. St. 298.

ordinary negligence, like the distinction between extreme care and ordinary care, is one which it is impossible to define, and almost impossible to describe. Whether such a distinction even exists has been doubted by many judges. Thus Baron Rolfe, in an early English case involving the rights of common carriers, said that he could see no difference between gross negligence and negligence; that it was the same thing with a vituperative epithet.[1] And in another English case Lord Denman says, —

"When we find gross negligence made the criterion to determine the liability of a common carrier who has given the usual notice, it might have been reasonably expected that something like a definite meaning should have been given to the expression. It is believed, however, that in none of the numerous cases upon this subject is any such attempt made, and it will be doubted whether between gross negligence and negligence merely, any intelligible distinction exists."[2] And in another case Willes, J., says, "Any negligence is gross in one who undertakes a duty and fails to perform it."[3] And this opinion is held in a recent case in North Carolina.[4]

§ 386. **Practical Importance of the Phrase.** — However difficult it may be to define the term "gross negligence," it has an important practical bearing upon the liability of telegraph companies; for while the courts differ, as will be seen later,[5] as to whether or not telegraph companies may exonerate themselves by contract stipulations with their customers, or by regulations brought to the notice of the customers, from liability for ordinary negligence in the transmission of telegraphic messages, yet they are unanimous in saying that by no contract stipulations or business regulations, even though

[1] Wilson *v.* Brett, 11 M. & W. 113.

[2] Hinton *v.* Dibbin, 2 Ad. & El. N. S. 646.

[3] Lord *v.* Midland Ry. Co., L. R. 3 C. P. 344.

[4] Brown *v.* Postal Telegraph Cable Co., 111 N. C. 187.

[5] *Infra*, §§ 509, 510 *et seq.*

brought to the knowledge of the customer, and assented to by him, can the telegraph company exonerate itself from liability consequential upon its gross negligence or that of its operators.[1]

§ 387. **Instances of Gross Negligence.** — Although "gross negligence" cannot well be defined, yet instances of negligence which the courts have characterized by the epithet "gross" will serve to show what meaning the term has in this connection. It is evident that the courts have in mind instances of negligence which are strikingly and obviously careless in character,— as where two errors occur in the same message, or where a word is changed to another word, the telegraphic symbols of which do not resemble each other at all, or where the operator is excessively careless or ignorant, or other similar cases. For instance, in a case in Indiana a telegram was addressed to a person at a town which was the county seat of a neighboring county, and one of the stations on the telegraph line. The telegraph operator, however, was ignorant of the existence of this town, and sent the telegram to a distant place having a somewhat similar name. The court held that this was gross negligence or incompetency on the part of the telegraph operator.[2]

[1] Clement *v.* Western Union Telegraph Co., 137 Mass. 463; Redpath *v.* Western Union Telegraph Co., 112 Mass. 71; Grinnell *v.* Western Union Telegraph Co., 113 Mass. 299; Ellis *v.* American Telegraph Co., 13 Allen, 226; Western Union Telegraph Co. *v.* Buchanan, 35 Ind. 429, 441; Tyler *v.* Western Union Telegraph Co., 60 Ill 421, 432; Wann *v.* Western Union Telegraph Co., 37 Mo. 472, 482; Passmore *v.* Western Union Telegraph Co., 78 Pa. St. 243; United States Telegraph Co. *v.* Wenger, 55 Pa. St. 262; Aiken *v.* Western Union Telegraph Co., 5 S. C. 358; Candee *v.* Western Union Telegraph Co., 34 Wisc. 471; Becker *v.* Western Union Telegraph Co. 11 Neb. 87; Western Union Telegraph Co. *v.* Fontaine, 58 Ga. 433; Schwartz *v.* Atlantic & Pacific Telegraph Co., 18 Hun, 157; Western Union Telegraph Co. *v.* Neill, 57 Tex. 283; Womack *v.* Western Union Telegraph Co., 58 Tex. 176; Jones *v.* Western Union Telegraph Co, 18 Fed. Rep. 717; Gillis *v.* Western Union Telegraph Co., 61 Vt. 461. Compare *post*, § 509.

[2] Western Union Telegraph Co. *v.* Buchanan, 35 Ind. 429.

§ 388. **Same Subject** (*continued*). — In a case in Wisconsin, where a message was given to an operator for transmission, and no attempt was ever made to forward it, this was called gross negligence on the part of the telegraph operator.[1]

In a case in Georgia a message was lost in transmission, and the company, on trial, could not trace it by their operators farther than to say that it was sent from the initial station to "some repeating office" between the starting-place and the destination of the message, but could not tell what repeating office it was sent to. This was held to be evidence of gross negligence.[2]

In another case in Georgia the plaintiff sent two messages on the same night, and an error was made in the transmission of each one. This appearing in evidence, the court termed this "the very grossest negligence."[3]

§ 389. **Same Subject** (*continued*). — In a case in Texas where a message was sent by a parent to summon a physician to attend a sick child, and the telegraph operator took the message, and in the language of the court "serenely hung it up on a hook," and failed to send it, the court characterized this as gross negligence on the part of the operator.[4]

In a case in Kansas the court held that three mistakes in one message, the whole message being only of nine words, and the original message being well written in a fair round hand so that no person reading it could be in doubt as to the words, and the weather during the transmission being fair and bright with no electrical disturbances, and there being no similarity proved between the symbols representing the words as written and those representing the words of the message as wrongfully delivered, constituted a state of

[1] Candee *v.* Western Union Telegraph Co., 34 Wis. 471.
[2] Western Union Telegraph Co. *v.* Fontaine, 58 Ga. 433.
[3] Western Union Telegraph Co. *v.* Shotter, 71 Ga. 760.
[4] Western Union Telegraph Co. *v.* Stephens, 2 Tex. Civ. App. 129.

facts upon which a trial court might lawfully find gross negligence on the part of the company.[1]

§ 390. **Same Subject** (*continued*). — In another case in the same State there was but one word erroneously transmitted, but this word was plainly written in the original message, and the operator at the office of destination, having some doubt about it as it was there received, telegraphed back to inquire if the word which he had read off was correct, and was told at the sending office that it was, it being, in fact, incorrect. The court held that these facts combined might fairly make a case on which gross negligence in the telegraph company might be found by the trial court.[2] In a case in Pennsylvania, where a message sent to New York from a southern port was transmitted as far as Philadelphia, and the company offered no reason for or explanation of its not being transmitted to its destination, this was held to be gross negligence.[3] In a case in New York[4] the plaintiff received a message from Armour & Co., in Chicago, quoting prices on pork, and wished to send a reply buying a certain quantity of pork. The message was given to the telegraph operator, and he called up the office of destination, but it was busy. Some one then came in on business, and the telegraph operator, in his absence of mind, put the message among the messages which had been sent, where it stayed for three or four days. The company defended on the ground that it was exempted by the stipulations in its blanks, but the trial court found that there was gross negligence, and the court on exceptions held that there was evidence enough to find this, and that the defendants could not exempt themselves by their contract from the effects of their gross negligence. It has also been held that if a telegraph

[1] Western Union Telegraph Co. *v.* Crall, 38 Kan. 679.
[2] Western Union Telegraph Co. *v.* Howell, 38 Kan. 685.
[3] United States Telegraph Co. *v.* Wenger, 55 Pa. St. 262.
[4] Mowry *v.* Western Union Telegraph Co., 51 Hun (N. Y.), 126.

company appoints as its agent in a place a man who knows nothing of telegraphing, but who runs a general store and employs as his clerk a man who, thirty years before, was a telegraph operator, and makes him do the telegraphing, this is gross negligence on the part of the company.[1]

§ 391. **Same Subject** (*continued*). — It has been held by the Supreme Court of the United States that an error in the transmission of a message, whereby the word "bay" was made to read "buy," was not gross negligence, although there were two other errors in the transmission of the same message. The message in question was a cipher message of some eighteen words, and it was sent from Pennsylvania to Kansas, and there were three errors in it as delivered. The jury found gross negligence. When the case came before the Supreme Court of the United States, that court examined the evidence relating to the transmission of the message, which was very fully reported, and traced the message correctly to a repeating station in Kansas, where the error probably occurred, and showed that the telegraphic symbols for the words "bay" and "buy" varied only by one dot, and that the messages were read off by the telegraph operators wholly by sound, and the error probably occurred when the message was read off by the receiving operator in the Kansas station, or repeated by him to the transmitting operator in the same station, and that the instruments were sufficient and the operators competent, and the court held that it was error for the jury to find gross negligence on this state of facts.[2]

§ 392. **Different Distinctions suggested.** — It is evident from what has been said above that the only importance of the distinction, whatever it may be, between gross negligence and ordinary negligence, is in connection with the stipulations often contained on the telegraph blanks, and which

[1] Western Union Telegraph Co *v.* Cook, 61 Fed. Rep. 624.

[2] Primrose *v.* Western Union Telegraph Co., 154 U. S. 1.

will be discussed at length later,[1] exempting the telegraph company from liability for damages caused by the negligence of its operators in transmitting or delivering messages. As was said above,[2] the courts, following the analogy of similar stipulations in the law of common carriers, have, even in those States in which they have maintained such stipulations as being valid, and as relieving the company from liability for its negligence, limited this exemption to cases not involving gross negligence of the company. The question, therefore, only arises in connection with an agreement or contract between the telegraph company and the customer in which certain stipulations are relied upon by the company as exempting it from its liability. The Supreme Court of Massachusetts have indicated in a somewhat recent case a test of the limits of this exemption which seems more logical, as well as more definite, than the attempted distinction between gross and ordinary negligence; to wit, that if the negligence complained of is such as, under all the circumstances, the parties must be presumed to have contemplated as covered by the exemption in the contract when the same was formed, then the exemption will protect the telegraph company.[3] Such negligence might be considered to include ordinary negligence in transmitting a message arising from delicacy of the instruments, the resemblance of the sounds or marks whereby messages are transmitted, and the carelessness of messenger boys in making delivery, and other ordinary incidental failures in telegraphing. Whereas extraordinary blunders or other instances of carelessness would be considered as not having been contemplated by the parties. In the case referred to,[4] the only negligence proved was an unexplained delay in delivering the message on the part of the messenger boy, to whom it was, after its receipt,

[1] *Post*, chapters xxv., xxvi. [2] *Supra*, § 386.
[3] Clement *v.* Western Union Telegraph Co., 137 Mass. 466.
[4] Ibid.

intrusted for delivery. The court says, "It may be that the company might be guilty of some fraudulent or gross negligence in transmitting or delivering the message, so that it would not be protected by its regulations from liability for the actual damages, though in excess of the sum stipulated; but the negligence of the messenger boys in delivering messages was plainly contemplated by the parties when they entered into the stipulation, and there are no principles of public policy which should prevent the company from stipulating that it will not be responsible for such negligence beyond a fixed amount, unless it receives a reasonable compensation for assuming further responsibility. Without discussing the question as to what is the difference, if any, between ordinary and gross negligence, we are of opinion that the only negligence proved in this case was such negligence as the parties intended to include in their stipulation, and that such stipulation as applied to such negligence is reasonable and valid."

§ 393. **Tendency to abolish the Distinction.** — Whatever may be the value of the above suggested rule, there is no doubt a tendency or desire on the part of the courts generally to abolish the indefinite and difficult distinction between gross and ordinary negligence.

§ 394. **Gross Negligence is for the Jury.** — The question of whether negligence is gross or ordinary, when this distinction is material, should be decided by the jury in the same manner as it decides the question of negligence; but the court may, as a matter of law, on undisputed facts of such a nature that the inference of gross negligence is unavoidable or impossible, declare the same as a matter of law, or may review the facts and decide whether or not they support the verdict.[1]

[1] Western Union Telegraph Co. *v.* Buchanan, 35 Ind. 429; Candee *v.* Western Union Telegraph Co., 34 Wisc. 471; Western Union Telegraph Co. *v.* Shotter, 71 Ga. 760; Western Union Telegraph Co. *v.* Stephens,

§ 395. **Evidence on this Point.** — In determining this question of gross negligence, as in other cases of negligence, all the facts and circumstances which logically tend to show care or its absence are relevant and admissible as facts upon which the jury may base their verdict.[1]

2 Tex. Civ. App. 129; Primrose *v.* Western Union Telegraph Co., 154 U. S. 1; Western Union Telegraph Co. *v.* Fontaine, 58 Ga. 433; Western Union Telegraph Co. *v.* Crall, 38 Kan. 679; Western Union Telegraph Co. *v.* Howell, Ib. 685. Compare *post*, § 409.

[1] Primrose *v.* Western Union Telegraph Co., 154 U. S. 1.

CHAPTER XVIII.

LIMITS OF DUTY OF TELEGRAPH COMPANY. — DUTY AS TO INSTRUMENTS AND OPERATORS.

§ 396. Particulars of Application.
397. Proper Instruments.
398. Repair of Instruments.
399. Competent Operators.
400. No Liability for Damages caused by Unavoidable Accidents.
§ 401. Storms or Electrical Disturbances.
402. Notice of Broken Wires.
403. Proof of the Exemption.

§ 396. **Particulars of Application.** — The rule being, as before stated, that a telegraph company, in the prosecution of its business, is bound to use reasonable care, as all companies pursuing public employments are bound to do, the question then arises to what particulars this care must be directed; and this branch of the subject may be divided into four divisions. First, care in selecting suitable instruments and keeping them in repair. Second, care in providing competent operators. Third, care in transmitting the message promptly and accurately; and, Fourth, care in delivering the message without unreasonable delay, to the person to whom it is addressed.

§ 397. **Proper Instruments.** — The telegraph company is bound by its obligation to the public to provide reasonably suitable instruments for the business which it undertakes to perform. It is not necessarily required to adopt the latest and most improved forms of instruments, but must provide such as a reasonably prudent man would employ in the conduct of the business, having regard to the importance of the employment and the dangers and difficulties surrounding it, and the question what are such instruments is for the jury.[1]

[1] Tyler *v.* Western Union Telegraph Co., 60 Ill. 421, 432; Fowler *v* Western Union Telegraph Co., 80 Me. 381; Aiken *v.* Western Union

§ 398. **Repair of Instruments.** — The telegraph company is not only obliged to provide suitable instruments, but to keep them in reasonable repair, and any errors which may be caused by negligence in the repair of the instruments will render the company liable for the damages caused thereby.[1]

§ 399. **Competent Operators.** — Telegraph companies are also obliged by the public nature of their business to provide operators of reasonable skill and intelligence for the transmission of messages, and a failure to provide such operators is negligence of the telegraph company.[2] Thus, for instance, where a telegraph operator did not know of the existence of the town to which the telegram was addressed, this town being a county seat of the State in which the sending office was, and one of the stations on the telegraph company's line, and not far distant from the sending office, it was held that this ignorance was evidence of incompetency which rendered the telegraph company liable for the transmission of the telegram to another town of the same name but in a different State.[3] So when the company appoints as its agent a man who knows nothing of telegraph-

Telegraph Co., 69 Ia. 31; Sweatland *v.* Illinois & Mississippi Telegraph Co., 27 Ia. 432; Manville *v.* Western Union Telegraph Co., 37 Ia. 214, 218; Becker *v.* Western Union Telegraph Co., 11 Neb. 87; Western Union Telegraph Co. *v.* Short, 53 Ark. 439; Western Union Telegraph Co. *v.* Graham, 1 Col. 230.

[1] Western Union Telegraph Co. *v.* Merrill (Tex.), 22 S. W. Rep. 826; Sweatland *v.* Illinois & Mississippi Telegraph Co., 27 Ia. 432; Manville *v.* Western Union Telegraph Co., 37 Ia. 214, 218; Becker *v.* Western Union Telegraph Co., 11 Neb. 87; Western Union Telegraph Co. *v.* Short, 53 Ark. 439; Tyler *v.* Western Union Telegraph Co., 60 Ill. 421.

[2] Western Union Telegraph Co. *v.* Cook, 61 Fed. Rep. 624, 629; Tyler *v.* Western Union Telegraph Co., 60 Ill. 421; Fowler *v.* Western Union Telegraph Co., 80 Me. 381; Aiken *v.* Western Union Telegraph Co. 69 Ia. 31; Sweatland *v.* Illinois & Mississippi Telegraph Co., 27 Ia. 432; Manville *v.* Western Union Telegraph Co., 37 Ia. 214, 218; Becker *v.* Western Union Telegraph Co., 11 Neb. 87; Western Union Telegraph Co. *v.* Short, 53 Ark. 439; Western Union Telegraph Co. *v.* Graham, 1 Col. 230.

[3] Western Union Telegraph Co. *v.* Buchanan, 35 Ind. 429.

ing, but who keeps a general store and employs as his clerk and telegraph operator a man who thirty years before had some experience in telegraphy, the company is liable on the ground that it has appointed an incompetent operator.[1]

§ 400. **Liability for Damages caused by Unavoidable Accidents.** — Before examining the subject of the duties of telegraph companies as to the transmission and delivery of messages, it will be well to discuss a topic which applies to both subjects. It has been seen that a telegraph company, in the absence of special contract, is not an insurer of messages, but is merely liable for negligence of itself or its servants in transmission and delivery. It follows that the telegraph company has no liability for errors or delays in transmission or delivery when the same are caused by acts or conditions, whether of natural forces or of third persons, which the telegraph company could not control or avoid by the exercise of reasonable care. Errors and delays caused by atmospheric disturbances may or may not be such causes and conditions as it is negligence for the telegraph company not to guard against. The question hinges on reasonable care and foresight on the part of the company, and is for the jury.[2]

§ 401. **Storms or Electrical Disturbances.** — Atmospheric or electrical disturbances which reasonable care on the part of the telegraph company could not have foreseen, and which destroy the lines or interrupt or interfere with the transmission of telegraphic messages, are not causes of error or delay for which the telegraph company is liable. Such are storms so severe or sudden in their nature that they could not have been reasonably foreseen or expected in the places where they occur, or electrical disturbances which from their subtle

[1] Western Union Telegraph Co. *v.* Cook, 61 Fed. Rep. 624.

[2] Beasley *v.* Western Union Telegraph Co., 39 Fed. Rep. 181, 186; Western Union Telegraph Co. *v.* Hope, 11 Ill. App. 289, 293; Fowler *v.* Western Union Telegraph Co., 80 Me. 381.

and unknown character could not be guarded against, or accidental fire occurring without fault of the company.[1] For instance, it has been held that a heavy and unexpected storm of snow and sleet throwing down the telegraph poles and breaking the wires, excused the company from liability for delay in transmitting a message.[2] If, however, the damage is caused by such atmospheric causes or electrical disturbances as the telegraph company ought reasonably to have foreseen and prevented or remedied, the disturbance does not exempt the company from its liability for error or delay caused thereby.[3] If the telegraph company is prevented by stress of weather from sending by the most direct route, it is not chargeable with negligence in sending by the next best route.[4]

§ 402. **Notice of Broken Wires.** — It is the unexpected and unpreventable character of these disturbances that exempts the telegraph company from its liability for their consequences, and therefore after the lines have been thrown down, or interruptions have occurred, and this fact is known to the telegraph operator, it may be negligence for him to accept a message without notifying the person intending to send the message of this fact.[5] In a few States, statutes require that if the line is not in working order, the operator shall give notice of this fact to the person offering the message.

[1] Fowler *v.* Western Union Telegraph Co., 80 Me. 381; Bartlett *v.* Western Union Telegraph Co., 62 Me. 209, 221; Tyler *v.* Western Union Telegraph Co., 60 Ill. 421; Sweatland *v.* Illinois & Mississippi Telegraph Co., 27 Ia. 433; Manville *v.* Western Union Telegraph Co., 37 Ia. 214; Telegraph Co. *v.* Griswold, 37 Oh. St. 301; Western Union Telegraph Co. *v.* Cohen, 73 Ga. 522.

[2] Western Union Telegraph Co. *v.* Hope, 11 Ill. App. 289; Beasley *v.* Western Union Telegraph Co., 39 Fed. Rep. 181, 186.

[3] Tyler *v.* Western Union Telegraph Co., 60 Ill. 421, 428.

[4] Beasley *v.* Western Union Telegraph Co., 39 Fed. Rep. 181.

[5] Fleischner *v.* Pacific Postal Telegraph Cable Co., 55 Fed. Rep. 738; Bierhaus *v.* Western Union Telegraph Co., 31 N. E. Rep. 581; Western Union Telegraph Co. *v.* Bierhaus, 39 N. E. Rep. 881.

§ 403. **Proof of the Exemption.** — The decisions are not uniform as to whether, in order to avail itself of the exemption which has been discussed in the two preceding sections, the telegraph company must show that the delay or error complained of was caused by uncontrollable causes, or whether the plaintiff must not only prove the delay or error of which he complains, but also prove by affirmative evidence that it was caused by the telegraph company. This question is connected with the question of whether the proof of an error or mistake in the transmission or delivery of a message is, in itself, proof of negligence, which will be discussed later.[1] The better opinion seems to be that the proof of error is *prima facie* proof of the negligence, and that the telegraph company must show by affirmative proof that the accident was the result of one of the causes from liability for which it is exempt.[2] In some courts, however, it is held that where evidence is merely given of the existence of an error in the message as received by the sendee, this evidence will not throw upon the telegraph company the burden of explaining the cause of the error, since it might have been the result of causes for which the telegraph company is not responsible. In these courts, therefore, the telegraph company is not obliged to show affirmatively that the error was the result of an exempted cause, when the plaintiff merely puts in evidence of the happening of the error. Until he has shown some distinct negligence on the part of the telegraph company, the latter can rely upon the presumption that the mistake was the result of causes over which the telegraph company has no control.[3] The effect on this rule

[1] *Infra*, § 407

[2] Tyler *v.* Western Union Telegraph Co., 60 Ill. 421; Fowler *v.* Western Union Telegraph Co., 80 Me. 390, and see *post*, § 407.

[3] Sweatland *v.* Telegraph Co., 27 Ia. 433; Aiken *v.* Western Union Telegraph Co., 5 S. C. 358; Western Union Telegraph Co. *v.* Neill, 57 Tex. 283; Womack *v.* Western Union Telegraph Co., 58 Tex. 176; Western Union Telegraph Co. *v.* Hearne, 77 Tex. 83; Jones *v.* Western Union

of the stipulations ordinarily presented on telegraph blanks, exempting the company from liability for negligence, is considered in a later section.[1]

Telegraph Co., 18 Fed. Rep. 717 (Ark.); Thompson *v.* Western Union Telegraph Co., 64 Wis. 531.

[1] *Post*, § 407.

CHAPTER XIX.

DUTIES OF TELEGRAPH COMPANY AS TO TRANSMISSION AND DELIVERY.

§ 404. Duty of Transmission, Total Failure.
405. Order of Transmission.
406. Accuracy of Transmission.
407. Error is *prima facie* Proof of Negligence.
408. Delay in Transmission or Delivery.
409. Question of Reasonable Care and Diligence is for the Court or Jury, when.
410. Excuses for Delay.
411. Diligence required in Delivery.
412. Delivery to Person.
413. Evidence of Attempted Delivery.
414. Address to "Care of."
§ 415. Delivery at Hotel or Place of Business.
416. Limited Free Delivery.
417. Statutes as to Free Delivery.
418. Change of Residence.
419. Delivery of Written Copy.
420. Delivery by Telephone.
421. Delay caused by Closed Office.
422. Reasonable Office Hours.
423. Fraudulent Messages.
424. Fraud of Telegraph Operator.
425. Same Subject (*continued*).
426. Negligence as Basis of Fraud.
427. Fraudulent Messages by Third Parties.
428. Substitution of Forged Message.

§ 404. **Duty of Transmission, Total Failure.** — The duty of a telegraph company to transmit messages is necessarily violated by a total failure to transmit, for instance, when the operator receiving the message makes no effort to transmit it, or carelessly places it among messages which have already been sent. Thus it has been held, that where the operator received the message and filed it away, and made no effort to send it, this was negligence for which the company was liable.[1] In all cases, however, the question is one of negligence, for the failure to transmit might be the result of some adequate cause which would relieve the telegraph company from liability. Thus, as has previously been seen,[2]

[1] Western Union Telegraph Co. *v.* Stephens, 2 Tex. Civ. App. 129; Candee *v.* Western Union Telegraph Co., 34 Wisc. 471; Birney *v.* New York & Washington Printing Telegraph Co., 18 Md. 341; Sprague *v.* Western Union Telegraph Co., 6 Daly, 200; s. c. 67 N. Y. 590.

[2] *Supra*, §§ 400–403.

failure to transmit a message owing to atmospheric or electrical disturbances may not be negligence on the part of the company.[1]

§ 405. **Order of Transmission.** — As to the order in which telegraphic messages must be forwarded, there have been in several States statutes enacted which require messages to be forwarded in the order of time in which they are received.[2] In a few States there are express exceptions to this order giving priority to messages sent by government officials or officers of justice in cases of war, riot, and the prevention of crime, or the arrest and punishment of criminals,[3] and also in favor of publication of news of public and general interest. In States where there is no statute on this point, the rule is that the company must forward the despatch with due diligence, or, in other words, without unreasonable delay. Even in States whose statutes prescribe the order of transmission, it is not enough for the telegraph company to follow strictly the order of receipt of the messages, but to forward promptly also, and the question on all the facts would be for the jury as to whether or not the company performed its duty as to promptness in the forwarding of the message.[4] In States where there is no statute as to order of transmission, postponing a despatch for a substantial time out of order of its receipt would be evidence of negligence which, if unexplained, would warrant the jury in finding for the plaintiff, and of course any preference whereby a despatch is wilfully postponed to the damage of the sendee will render the telegraph company liable.[5] The rules which apply to prompt-

[1] Fowler *v.* Western Union Telegraph Co., 80 Me. 381; Tyler *v.* Western Union Telegraph Co., 60 Ill. 421; Western Union Telegraph Co. *v.* Cohen, 73 Ga. 522; Beasley *v.* Western Union Telegraph Co., 39 Fed. Rep. 181.

[2] *Supra*, §§ 321–349. [3] Ibid.

[4] Western Union Telegraph Co. *v.* Ward, 23 Ind. 377, and see cases, *post*, § 408.

[5] Davis *v.* Western Union Telegraph Co., 1 Civ. Sup. Ct. Rep. 100.

ness in transmitting despatches being intimately connected with those which apply to prompt delivery of despatches, and the latter being the larger and more important branch of the subject, the fuller discussion of these rules will be deferred to the section which treats of the latter subject.[1]

§ 406. **Accuracy of Transmission.** — The telegraph company is bound to use reasonable care to secure the transmission of a message in the very words in which it is given to the operator for transmission, and failure to do so will render the company liable for damages caused thereby in the absence of valid contract stipulations exempting it therefrom.[2] The question is one of negligence in every case, and like all questions of negligence, is generally for the jury.[3] How far this liability for negligence may be avoided by the telegraph company by express contract stipulations is considered in a later chapter.[4]

§ 407. **Error is prima facie Proof of Negligence.** — There is a lack of uniformity in the decisions of the courts as to whether proof of error in the transmission of a message, or

[1] *Post*, § 408.

[2] New York & Washington Printing Telegraph Co. *v.* Dryburg, 35 Pa. St. 298; Tyler *v.* Western Union Telegraph Co., 60 Ill. 421; Rittenhouse *v.* Independent Line of Telegraph, 44 N. Y. 263; Ellis *v.* American Telegraph Co., 13 Allen, 226; Bartlett *v.* Western Union Telegraph Co., 62 Me. 209; Grinnell *v.* Western Union Telegraph Co., 113 Mass. 299, 303; Western Union Telegraph Co. *v.* Meek, 49 Ind. 53; Lowery *v.* Western Union Telegraph Co., 60 N. Y. 198; Passmore *v.* Western Union Telegraph Co., 78 Pa. St. 242; Turner *v.* Hawkeye Telegraph Co., 41 Ia. 458; Telegraph Co. *v.* Griswold, 37 Oh. St. 301, 313; Western Union Telegraph Co. *v.* Blanchard, 68 Ga. 299; Western Union Telegraph Co. *v.* Cohen, 73 Ga. 522; Abraham *v.* Western Union Telegraph Co., 23 Fed. Rep. 315; Western Union Telegraph Co. *v.* Howell, 38 Kan. 685; Western Union Telegraph Co. *v.* Cook, 61 Fed. Rep. 624; Western Union Telegraph Co. *v.* Crall, 38 Kan. 679; Ayer *v.* Western Union Telegraph Co., 79 Me. 493; Pearsall *v.* Western Union Telegraph Co., 124 N. Y. 256, 265; Western Union Telegraph Co. *v.* Harris, 19 Ill. App. 347; Western Union Telegraph Co. *v.* Short, 53 Ark. 434; Pinckney *v.* Western Union Telegraph Co., 19 S. C. 71.

[3] See cases *post*, § 409.

[4] *Post*, cc. xxv., and xxvi.

rather proof that the message as delivered to the addressee differs from the message given to the telegraph company for transmission, is proof of negligence on the part of the company in transmission. It has been held that it is such proof, and that in the trial of a case, the introduction of the message delivered to the addressee, and proof that there is a variation between that and the message delivered to the telegraph company for transmission, raise a *prima facie* case of negligence for the jury, and that the telegraph company is then bound to introduce evidence to show that the error was the result of some cause which excuses the telegraph company, if it means to avoid liability for the damages, unless it is protected by valid contract stipulations.[1]

In a minority of States, however, it has been held that since the happening of the error might be the result of causes for which the telegraph company would not be liable, such as electrical or atmospheric disturbances, the mere proof of a mistake in transmitting the message does not constitute a *prima facie* proof of negligence, and that it is necessary for the plaintiff who wishes to make out a case of negligence, not only to prove the existence of the error in the despatch, but also to offer some proof of the negligence of the company

[1] Western Union Telegraph Co. *v.* Short, 53 Ark. 434; Telegraph Co. *v.* Griswold, 37 Oh. St. 301, 313; Western Union Telegraph Co. *v.* Harris, 19 Ill. App. 347; Ayer *v.* Western Union Telegraph Co., 79 Me. 493; Bartlett *v.* Western Union Telegraph Co., 62 Me. 209; Becker *v.* Western Union Telegraph Co., 11 Neb. 87; Western Union Telegraph Co. *v.* Blanchard, 68 Ga. 299; Western Union Telegraph Co. *v.* McDaniel, 103 Ind. 291; Western Union Telegraph Co. *v.* Meek, 49 Ind. 53; Western Union Telegraph Co. *v.* Howell, 38 Kan. 685; Western Union Telegraph Co. *v.* Crall, 38 Kan. 679; Western Union Telegraph Co. *v.* Cook, 61 Fed Rep. 624; Pearsall *v.* Western Union Telegraph Co., 124 N. Y. 256, 265; Rittenhouse *v.* Independent Line of Telegraph, 44 N. Y. 263, 265; Turner *v.* Hawkeye Telegraph Co., 41 Ia. 458; Tyler *v.* Western Union Telegraph Co., 60 Ill. 421; Pinckney *v.* Western Union Telegraph Co., 19 S. C. 71. As to the validity of contract stipulations exempting from liability, see *post*, chap. XXVI.

from which the error sprung,[1] the nature of the mistake sometimes furnishing the necessary inference of negligence. A distinction should be drawn in this rule, however, between cases where there is a valid special contract stipulation relieving the company from liability for its own negligence or that of its employees unless the message is repeated,[2] and cases where no such special contract exists, or is held void by the courts. In the latter case, as was said above, evidence of the existence of the error is generally held to form *prima facie* proof of negligence.[3] In the former case it is not sufficient to show the existence of the error, but the plaintiff must go further and show that it arose from some negligence of the company for which it is liable.[4] But if his initial proof is strong enough to show gross negligence, the burden is then upon the telegraph company to excuse it.[5]

[1] Sweatland *v.* Illinois & Mississippi Telegraph Co., 27 Ia. 433; Aiken *v.* Western Union Telegraph Co., 69 Ia. 31; Aiken *v.* Western Union Telegraph Co., 5 S. C. 358; Western Union Telegraph Co. *v.* Neill, 57 Tex. 283; Camp *v.* Western Union Telegraph Co., 1 Metc. (Ky.) 164; Western Union Telegraph Co. *v.* Hearne, 77 Tex. 83; Womack *v.* Western Union Telegraph Co., 58 Tex. 176; Thompson *v.* Western Union Telegraph Co., 64 Wisc. 531; Jones *v.* Western Union Telegraph Co., 18 Fed. Rep. 717.

[2] See *post*, ch. xxvi.

[3] Ayer *v.* Western Union Telegraph Co., 79 Me. 493; Telegraph Co. *v.* Griswold, 37 Oh. St. 301; Pearsall *v.* Western Union Telegraph Co., 124 N. Y. 256, 265; Rittenhouse *v.* Independent Line of Telegraph, 44 N. Y. 263; Turner *v.* Hawkeye Telegraph Co., 41 Ia. 458; Western Union Telegraph Co. *v.* Harris, 19 Ill. App. 347; Tyler *v.* Western Union Telegraph Co., 60 Ill. 421; Western Union Telegraph Co. *v.* Short, 53 Ark. 434; Western Union Telegraph Co. *v.* Edsall, 63 Tex. 668; Pinckney *v.* Western Union Telegraph Co., 19 S. C. 71; Western Union Telegraph Co. *v.* Cook, 61 Fed. Rep. 624; Western Union Telegraph Co. *v.* Howell, 38 Kan. 685; Western Union Telegraph Co. *v.* Crall, 38 Kan. 679; Bartlett *v.* Western Union Telegraph Co., 62 Me. 209. *Contra*, Sweatland *v.* Illinois & Mississippi Telegraph Co., 27 Ia. 433, and cases *supra*, note 1.

[4] Western Union Telegraph Co. *v.* Hearne, 77 Tex. 83; Womack *v.* Western Union Telegraph Co., 58 Tex. 176; Jones *v.* Western Union Telegraph Co., 18 Fed. Rep. 717.

[5] Western Union Telegraph Co. *v.* Howell, 38 Kan. 685; Western Union Telegraph Co. *v.* Crall, 38 Kan. 679.

The practical effect of the difference in the decisions above noted is that in cases where proof of a change in the wording of a telegraph is *per se* evidence of negligence, the jury are obliged to find for the plaintiff unless this change is explained by the telegraph company; whereas, if the mere change is not evidence of negligence, the jury take all the circumstances of the case under consideration, and may or may not find for the plaintiff according as in their view there is or is not negligence on the part of the telegraph company. The question of error in cipher messages is discussed later in the chapter on Measure of Damages.[1]

§ 408. **Delay in Transmission or Delivery.** — The telegraph company is bound to use reasonable diligence in forwarding and delivering telegraphic despatches with promptness. The telegraph being valuable solely on account of the almost instantaneous communication which may be obtained thereby between places widely separated, the company which undertakes the business of supplying telegraphic facilities to the public is necessarily bound to use a degree of promptness in the operation of transmitting and delivering the despatch which is proportionate to the quickness of the operation of electricity. The reasonable diligence, therefore, which is required in the transmission and delivery of despatches is much greater than would be required in the case of letters, parcels, and other instances of ordinary transmission or transportation of articles from place to place. The principles which apply to negligence in the transmission of a message, apply as well to negligence in delivery, and may therefore be discussed together, except when in some subordinate points they may be necessarily differentiated by the circumstances attending the two classes. The duty of the telegraph company in both cases is to use reasonable diligence in the transmission of the telegraphic message over the lines, and in delivering the same upon its receipt at the

[1] See *post*, ch. xxviii., § 588 *et seq.*

office of destination to the person to whom it is addressed, and negligence in either of these particulars will render the telegraph company liable unless it is protected by valid contract stipulations.[1] The question of what contract stipulations in this regard are held valid is discussed in a later chapter.[2] Of course, a total failure to transmit a message renders the company liable *a fortiori*.[3]

§ 409. **Question of Reasonable Care and Diligence is for the Court or Jury, when.** — In some cases the question of whether or not the telegraph company has exercised due diligence in transmitting and delivering a message, is a question of law for the court. Thus if the facts are undisputed, or if they have been settled by a verdict, the court may examine them and decide upon the question of reasonable time in extreme cases; that is, if upon the facts, the court is of the opinion that no reasonably prudent man would have delayed the transmission of the message in the prosecution of his own business for the length of time in question, the court may pronounce it negligence as a matter of law in the telegraph company to have incurred this delay; and, on the other hand, if the court can say that in its opinion no man could reason

[1] Candee *v.* Western Union Telegraph Co., 34 Wisc. 471; Thompson *v* Western Union Telegraph Co., 64 Wisc. 531; Manville *v.* Western Union Telegraph Co., 37 Ia. 214; Hibbard *v.* Western Union Telegraph Co., 33 Wisc. 538; Beaupre *v.* Pacific & Atlantic Telegraph Co., 21 Minn. 155; Western Union Telegraph Co. *v.* Fontaine, 58 Ga. 433; Western Union Telegraph Co. *v.* Fenton, 52 Ind 1; First Nat'l Bank of Barnesville *v.* Western Union Telegraph Co., 30 Oh. St. 555; Pope *v.* Western Union Telegraph Co., 9 Ill. App. 283; Western Union Telegraph Co. *v.* Hope, 11 Ill. App. 289; Little Rock & Fort Smith Telegraph Co. *v.* Davis, 41 Ark. 79; Daughtery *v.* American Union Telegraph Co., 75 Ala. 168; Western Union Telegraph Co. *v.* Young, 93 Ind. 118; Western Union Telegraph Co. *v.* Harding, 103 Ind. 505; Western Union Telegraph Co. *v.* Valentine, 18 Ill. App. 57; Conyers *v.* Postal Telegraph Cable Co., 19 S. E. Rep. 253; Western Union Telegraph Co. *v.* Blance, Ib. 255; Clement *v.* Western Union Telegraph Co., 137 Mass. 463.

[2] *Post*, ch. xxvi.

[3] See cases, *supra*, note 1, and *post*, § 409, note 3, p. 362.

ably be required to use more promptness than is shown on the part of the telegraph company in the case in question, the court may decide as a matter of law that there is no evidence of negligence.[1] There can, from the nature of the case, be no general rule laid down as to what constitutes an unreasonable time for the transmission and delivery of a telegraphic message, and it would therefore be useless to cite a number of cases to show what length of time has been so held. There have been cases in which, on the facts of the case, a delay of seven days in sending a message a distance which would not warrant such length of time has been held grossly unreasonable.[2] So a delay of three days under similar circumstances,[3] and eight days,[4] and even a delay of several hours, may be held under the circumstances to be unreasonable.[5] The question of unreasonable delay, however, is, except as above stated, peculiarly one for the jury upon all the facts and circumstances which may be shown for or against the telegraph company.[6] The burden of proof

[1] Julian *v.* Western Union Telegraph Co., 98 Ind. 327; Western Union Telegraph Co. *v.* McDaniel, 103 Ind. 294; Koons *v.* Western Union Telegraph Co., 102 Pa. St. 164.

[2] Mowry *v.* Western Union Telegraph Co., 51 Hun, 126.

[3] Harkness *v.* Western Union Telegraph Co., 73 Ia. 190.

[4] Young *v.* Western Union Telegraph Co., 107 N. C. 370.

[5] Western Union Telegraph Co. *v.* Scircle, 103 Ind. 227.

[6] Western Union Telegraph Co. *v.* Fatman, 73 Ga. 285; Western Union Telegraph Co. *v.* Valentine, 18 Ill. App. 57; Behm *v.* Western Union Telegraph Co., 8 Biss. (U. S.) 131; Brown *v.* Western Union Telegraph Co., 6 Utah, 219; Western Union Telegraph Co. *v.* Smith, 21 S. E. Rep. 166; Western Union Telegraph Co. *v.* Eskridge, 7 Ind. App. 208; Julian *v.* Western Union Telegraph Co., 98 Ind. 327; Western Union Telegraph Co. *v.* Gougar, 84 Ind. 176; Western Union Telegraph Co. *v.* Fenton, 52 Ind. 1; Western Union Telegraph Co. *v.* Scircle, 103 Ind. 227; Western Union Telegraph Co. *v.* Young, 93 Ind. 118; Western Union Telegraph Co. *v.* Bennett, 1 Tex. Civ. App. 558; Gulf, Colorado & Santa Fe Ry. Co. *v.* Wilson, 69 Tex. 742; Western Union Telegraph Co. *v.* Cocke, 22 S. W. Rep. 1005; Fowler *v.* Western Union Telegraph Co., 80 Me. 381; Pope *v.* Western Union Telegraph Co., 9 Ill. App. 283; Barrett *v.* West-

of negligence in the transmission and delivery of messages is upon the plaintiff, who must show such delay as in the opinion of the court constitutes negligence on the part of the telegraph company; but the telegraph company may meet this proof of delay by showing some excusable cause for the delay, such as atmospheric or electrical disturbances, which have been previously stated;[1] but the question remains a question of negligence, and the burden of proof at the end of the introduction of evidence by both parties remains upon the plaintiff to show, by a preponderance of evidence, negligence on the part of the telegraph company.[2] Proof of total failure to transmit raises a presumption of negligence.[3]

§ 410. **Excuses for Delay.** — Various facts may constitute sufficient excuse for delay in the transmission of a telegraphic message, and relieve the company from the imputation of negligence. The excuse of electrical and atmospheric disturbances has been already stated.[4] In some cases telegraph companies have attempted to excuse delay in transmission of a message by the fact that the lines were in use for railway business. This excuse has been held in Texas not to constitute a defence to such an action, since railway business has no precedence over ordinary messages in transmission. If this fact, however, is told to the sender at the time of sending the message, it would probably be held that his knowledge of the fact would constitute an acquiescence

ern Union Telegraph Co., 42 Mo. App. 542; Western Union Telegraph Co. *v.* Jobe, 6 Tex. Civ. App. 407; Western Union Telegraph Co. *v.* Wingate, 6 Tex. Civ. App. 394.

[1] *Supra*, §§ 400–403.

[2] Western Union Telegraph Co. *v.* Bennett, 1 Tex. Civ. App. 558; Western Union Telegraph Co. *v.* Cocke, 22 S. W. Rep. 1005; Pope *v.* Western Union Telegraph Co., 9 Ill. App. 283; Fowler *v.* Western Union Telegraph Co., 80 Me. 381.

[3] Julian *v.* Western Union Telegraph Co., 98 Ind. 327; Fowler *v.* Western Union Telegraph Co., *supra*.

[4] *Supra*, §§ 400–403.

in this method of transmission.[1] The excusable delays which arise from the closing of an intermediate or terminal office of the telegraph company will be considered later.[2]

§ 411. **Diligence required in Delivery.** — A telegraph company is bound to use reasonable diligence and care in making proper delivery of the message in other respects besides promptness, for instance, delivery to the right person or at the right place, and the question whether or not it has done so is for the jury under instructions from the court.[3] The state of facts upon which the court can pass as a question of law has been stated in a preceding section.[4] On undisputed or ascertained facts from which the inference of negligence or not is necessarily drawn, the court may decide the case as a matter of law.[5]

§ 412. **Delivery to Person.** — The leading principle as to delivery of a telegram is that the message is to be delivered to the person to whom it is addressed, and the place of address is subordinate to the person; and therefore if the person cannot be found at the street and number or other place to which the telegram is addressed, but can be found by reasonable efforts of the telegraph company in some other place, it may be negligence for the company to leave the telegram at the place of address without making further efforts to find the absent person and make personal delivery.[6]

[1] Western Union Telegraph Co. *v.* Rosentreter, 80 Tex. 406; Western Union Telegraph Co. *v.* Jobe, 6 Tex. Civ. App. 407.

[2] *Infra*, § 421.

[3] Pope *v.* Western Union Telegraph Co., 9 Ill. App. 283; Thorp *v.* Western Union Telegraph Co., 84 Ia. 190; Western Union Telegraph Co. *v.* Bennett, 1 Tex. Civ. App. 558; Julian *v.* Western Union Telegraph Co., 98 Ind. 327.

[4] *Supra*, § 409.

[5] *Supra*, § 409. Cf. Given *v.* Western Union Telegraph Co., 24 Fed. Rep. 119.

[6] Pope *v.* Western Union Telegraph Co, 9 Ill. App. 283; Western Union Telegraph Co. *v.* De Jarles, 27 S. W. Rep. 792; Western Union Telegraph Co. *v.* Houghton, 82 Tex. 561; Western Union Telegraph Co. *v.*

Thus where a message was addressed to plaintiff at "Vandalia Freight Yards, Terre Haute, Ind.," it was held that, in the absence of any proof that such freight yards were a public place at which mail and telegraphic messages were received by persons having business with the railroad company, it was the duty of the telegraph company, on being informed that no such person as the plaintiff was employed or known about the yards, to make further effort to find him, instead of leaving the message with the yard-master, especially as the plaintiff's residence or place of business could have been easily ascertained by consulting the city directory or inquiring at the post-office.[1] Moreover, a telegraph company cannot allow a message to remain in its office until called for by the person to whom it is addressed, but must make reasonable efforts to deliver it to him.[2]

§ 413. **Evidence of Attempted Delivery.** — Proof of any attempts of the telegraph company to deliver a message is competent evidence when the question of care and diligence of the company in delivery is at issue, and also proof of the difficulty or ease of finding the person to whom the telegram is addressed. For example, if a telegraph company makes efforts to notify the addressee of the receipt of the telegram by mail or otherwise, this is competent evidence upon the question of due diligence on the part of the company.[3] So evidence is competent on either side showing that the person to whom the telegram is addressed was or was not a person well known in business and social circles, and that his place of business was or was not in a central portion of the city, and that his residence was or was not well known, and other

Newhouse, 6 Ind. App 422; Beasley *v.* Western Union Telegraph Co., 39 Fed. Rep. 181; Thorp *v.* Western Union Telegraph Co., 84 Ia. 190.

[1] Western Union Telegraph Co. *v.* Newhouse, 6 Ind. App. 422.

[2] Western Union Telegraph Co. *v.* Lindley, 62 Ind. 371. Cf. Western Union Telegraph Co. *v.* Mansfield, 93 Ga. 349; Western Union Telegraph Co. *v.* Timmons, 93 Ga. 345.

[3] Thorp *v.* Western Union Telegraph Co., 84 Ia. 190.

similar facts.[1] If the operator at an intermediate point knows of the existence of a town in the State, the name of which is like but not the same as that given in the address as the destination of the telegram, and is in doubt whether or not he should send it there, he is negligent if he does not. Thus in a case where the town name of address was written "Wallace," but the correct name was "Wallis," it was held that the telegraph operator, knowing of the town of "Wallis," should have tried it.[2]

§ 414. **Address to "Care of."** — Although the duty of the telegraph company is to deliver to a certain person, it may not always be bound to deliver to the person for whom the telegram is intended, for if the telegram is addressed to X. "in care of" Y., the telegraph company may deliver the telegram to Y. without being guilty of any negligence even if it fails to reach X.[3] But if the telegraph company cannot find the person to whose care the telegram is sent, it may be guilty of negligence if it makes no effort to find the person for whom the telegram is intended,[4] nor can the telegram be delivered to one whom the person to whose care it is addressed has selected to receive messages for him.[5]

§ 415. **Delivery at Hotel or Place of Business.** — The duty of the telegraph company to deliver messages to the persons to whom they are addressed is necessarily modified so as to admit of delivery to their representatives or duly authorized agents or servants. Thus, for instance, if a person engages rooms in a hotel in the office of which there is a place for the reception of letters and other written communications for each guest, this being one of the obvious and evident

[1] Gulf, Col. & S. F. Ry. Co. *v.* Wilson, 69 Tex. 743.

[2] Beasley *v.* Western Union Telegraph Co., 39 Fed. Rep. 181.

[3] Western Union Telegraph Co. *v.* Young, 77 Tex. 245; Western Union Telegraph Co. *v.* Terrell, 30 S. W. Rep. 70.

[4] Western Union Telegraph Co. *v.* Houghton, 82 Tex. 562.

[5] Thompson *v.* Western Union Telegraph Co., 30 S. W. Rep. 250.

arrangements of the hotel, patent to all guests and established by common usage, a telegram which is duly delivered to the hotel clerk and placed in such receptacle is considered duly delivered to the addressee.[1] If the telegram is addressed to a person at a residence or place of business, and the telegraph company sends it there by messenger, but is not able to deliver it there by reason of the absence of the person, it is the duty of the telegraph company to use reasonable efforts to follow up the addressee and deliver the message to him at the place where he may be found, and unless it uses reasonable efforts to do so, it will be held to have failed in its delivery.[2]

§ 416. **Limited Free Delivery.** — In many places telegraph companies establish by regulation a certain limited distance from the office within which distance telegrams will be delivered free, but outside of which an additional fee is charged for delivery. Such a regulation is held by the courts to be reasonable, and one which the company is justified in making as one of the regulations of its business.[3] Its effect upon the duty of the company as to delivery of the message seems to be a matter upon which the courts are not uniform. In one State it is held that the regulation is presumed to be known to the sender of the message, or at all events, that he is bound to know whether the person to whom he sends the telegram lives within the free delivery district of the company, and if he sends a message, which is addressed to a person beyond the free delivery limits, the company is not chargeable with negligence if it fails to deliver the message without the payment of the additional fee.[4] In other States such a regulation has been held not to release the company from its duty to deliver the message, even

[1] Western Union Telegraph Co. *v.* Trissel, 98 Ind. 566.
[2] Pope *v.* Western Union Telegraph Co., 9 Ill. App. 283.
[3] Western Union Telegraph Co. *v.* Henderson, 89 Ala. 516.
[4] Ibid.

beyond the limits of the free delivery district, if the sender does not know of the regulations.[1] In several cases it has been so held even where the telegraph blank on which the message was written contained a stipulation that the message would be delivered free only within the limits of free delivery of the terminal office, and that an additional fee would be charged for delivery beyond these limits, the court holding that, if the telegraph company found that it could not deliver the message for that reason, it should have notified the sender and allowed him an opportunity to send the additional fee.[2] But it seems a more just rule that if the telegraph company notifies the sender of the existence of the regulation, as by printing it on its blank or otherwise, it will be protected for failure to deliver outside the district, without the payment of an additional fee, and the sender, knowing of the rule, must ascertain whether the person to whom he sends is within the limited delivery district.[3] Failure to deliver a telegram cannot be defended by reason of the place of delivery being outside the limited delivery district, if the company undertakes to deliver it and receives the extra toll for such delivery, or usually makes free delivery outside the limits;[4] or if the operator, being informed that the addressee lives out of the limits, agrees to collect from him.[5] If the telegram is not sent at all, the regulation as to limits of free delivery is of course no defence to the telegraph company.[6]

[1] Brashears *v.* Western Union Telegraph Co., 45 Mo. App. 433; Anderson *v.* Western Union Telegraph Co., 84 Tex. 17.

[2] Anderson *v.* Western Union Telegraph Co., *supra.* And to the same effect, Western Union Telegraph Co. *v.* Womack, 29 S. W. Rep. 932; Western Union Telegraph Co. *v.* O'Keefe, 29 S. W. Rep. 1137; Western Union Telegraph Co. *v.* Moore, 39 N. E. Rep. 874.

[3] Bierhaus *v.* Western Union Telegraph Co., 8 Ind. App. 216.

[4] Western Union Telegraph Co. *v.* Teague, 27 S. W. Rep. 958; Western Union Telegraph Co. *v.* Womack, 29 S. W. Rep. 932.

[5] Western Union Telegraph Co. *v.* O'Keefe, 29 S. W. Rep. 1137.

[6] Horn *v.* Western Union Telegraph Co., 88 Ga. 538.

§ 417. **Statutes as to Free Delivery.** — In a few States,[1] statutes enact that the telegraph company must deliver messages free within certain limited districts. Such statutes have no force outside of the State which enacts them, since, if they had, they would amount to an interference with interstate commerce, as has been seen before.[2] Under a statute which requires telegraph companies to deliver messages to residents within certain limited delivery districts, the court has held that a person who is a transient visitor to the town or city, and who does not furnish the company with any definite address, is not a person resident in the same or within the limited delivery district in the contemplation of such an act.[3] In any case, the fact that the person to whom the message is sent lives outside of the limit of free delivery, is a matter of excuse on the part of the telegraph company, and does not form a part of the plaintiff's case.[4]

§ 418. **Change of Residence.** — If a person expecting to receive a telegram changes his residence, it is competent for him to enter into an agreement with the telegraph company to forward all messages when received to him at his new address, and this agreement will be material in considering the question of whether or not the telegraph company has used reasonable care in endeavoring to deliver the message to the person to whom it is addressed. The question of due care in this, as in all other cases, is for the jury.[5] The fact that the telegraph company mails a postal card containing information of the receipt of the telegram to the

[1] California, Connecticut, Georgia, Minnesota, Mississippi, Ohio, Virginia. See statutes *supra*, ch. xv., §§ 322, 324, 325, 335, 336, 342, 346.

[2] *Supra*, § 51; Western Union Telegraph Co. *v.* Pendleton, 122 U. S. 358. Cf. Western Union Telegraph Co. *v.* Bright, 20 S. E. Rep. 146; Western Union Telegraph Co. *v.* Bates, 93 Ga. 352; Western Union Telegraph Co. *v.* Tyler, 90 Va. 297.

[3] Moore *v.* Western Union Telegraph Co., 87 Ga. 613.

[4] Western Union Telegraph Co. *v.* Lindley, 62 Ind. 371.

[5] Thorp *v.* Western Union Telegraph Co., 84 Ia. 190.

new address is competent evidence on this question of its having used reasonable diligence in forwarding the telegram.[1]

§ 419. **Delivery in Writing.** — The duty of a telegraph company, generally speaking, is to deliver the telegram in writing. No other form of delivery is sufficient, unless by special agreement.[2]

§ 420. **Delivery by Telephone.** — In the absence of any special agreement or statutory authority, the transmission of a message from the office of destination to the addressee by telephone is not a compliance with the duty of the telegraph company, although by special agreement this may be substituted for the delivery of a written copy.[3]

§ 421. **Delay caused by Closed Office.** — Cases often occur where a delay in the transmission of a message is caused by the fact that the office to which it is addressed, or some intermediate office, closes earlier than the office sending it. It is therefore either retained at the first office, or sent and received at the terminal or intermediate office after the regular office hours are over. The question then arises whether the telegraph operator at the office where the message is received for transmission should have informed the person sending the message of the fact that the other office was closed, or if the operator did not know this fact, whether his ignorance was itself to be considered negligence of the company in not keeping him informed of the closing hours of all the other offices of the company. This question was discussed in a case in Indiana, in which the message was received at an office of the company at half past seven in the evening. The office hours at the place of receiving extended until nine o'clock in the evening. The message was duly transmitted from that office to the office to which it

[1] Thorp *v.* Western Union Telegraph Co., 84 Ia. 190.

[2] Brashears *v.* Western Union Telegraph Co., 45 Mo. App. 433.

[3] Ibid.

was addressed, but the office hours at the latter office ended at seven o'clock in the evening. This latter office, however, was situated in the station of a railroad company, and the railroad operator, being present, received the message and read it off, and wrote it on a blank and laid it aside for the regular telegraph operator. This was Saturday night. Sunday morning about nine o'clock the regular telegraph operator came around to the office, and finding the message there took it and endeavored to find the person to whom it was addressed, but did not succeed until the evening of that day. The action was brought to recover a statutory penalty for negligence in transmission of messages received during "usual office hours," and the court held that the company had a right to establish different office hours in different places, since the business requirements in different places varied with the size and importance of the place; and that the telegraph company should not be required to inform each office of the office hours established in every other place, since this would be almost impossible on account of the great number of offices, and the frequent changes in the office hours; and that the telegraph company was not in fault in any way, and that the penalty was not recoverable.[1]

§ 422. **Reasonable Office Hours.** — In accordance with the above decision, the general rule is now established that a telegraph company has the right to establish reasonable office hours for its offices, and that delay in the transmission of a message caused by the fact that a terminal or intermediate office is closed, is not an unreasonable delay, nor does it render the company liable for damages.[2]

§ 423. **Fraudulent Messages.** — In a number of instances

[1] Western Union Telegraph Co. *v.* Harding, 103 Ind. 505.

[2] Western Union Telegraph Co. *v.* Wingate, 6 Tex. Civ. App. 394; Given *v.* Western Union Telegraph Co., 24 Fed. Rep. 119; Western Union Telegraph Co. *v.* Neel, 86 Tex. 368; Western Union Telegraph Co. *v.* De Jarles, 27 S. W. Rep. 792; Western Union Telegraph Co. *v.* May, 27 S. W. Rep. 760.

fraudulent messages have been transmitted over telegraph lines, and have resulted in loss to the persons to whom they were delivered, the messages, in most instances, being requests for the forwarding of money to the person sending the message, who falsely assumes the name of some person related to the person to whom the telegram is addressed, either by kinship or business relations. As regards the liability of the telegraph company, such messages may be divided into two classes; first, those sent by telegraph operators, and second, those sent by third parties. Before discussing the liability of the telegraph company for such messages, it is well to note that in several States statutes have been expressly enacted imposing fines, and in some cases civil liability for the transmission of such messages. Thus in California, knowingly and wilfully sending a false or forged message, or conspiring to do so, is punishable by fine and imprisonment.[1] In Colorado the same offence is made a misdemeanor, and also subjects the offender to civil action.[2] In Illinois, transmitting or causing to be transmitted by telegraph, any falsehood, knowing the same to be such, is finable.[3] In Kentucky, knowingly transmitting any false communication or intelligence with intent to injure any one, or to speculate is finable.[4] In Maine an operator or agent who designedly falsifies a despatch forfeits not less than twenty dollars nor more than one hundred dollars, and in his default the company pays the forfeit.[5] In Missouri, knowingly transmitting a false communication or intelligence with intent to injure or speculate is finable.[6] In Nevada, knowingly or wilfully sending a false or forged message, or conspiring to do the same, is punished by fine and imprisonment.[7] In Ohio, knowingly transmitting any false commun-

[1] Pen. Code, § 474.
[2] Ann. Stat. § 1393.
[3] Ann. Stat. ch. 134, ¶ 8.
[4] Gen. Stats. p. 431, § 10.
[5] Rev. Stats. ch. 53, § 1.
[6] Rev. Stat. § 2728.
[7] Gen. Stats. § 923.

ication or intelligence, with intent to injure any person, or to speculate, or sending a forged message, subjects the person to a penalty.[1] In Oregon, knowingly and wilfully sending a false or forged message, or conspiring to do so, is punishable by fine and imprisonment.[2] In most cases these statutes apply equally to telegraph operators and to the public at large.

§ 424. **Fraud of Telegraph Operator.** — Taking up now the civil liability: If a telegraph operator sends a fraudulent or forged message, and thereby the person to whom the message is sent is injured, the telegraph company is responsible to the party so injured for his damages, for the telegraph company is liable as a principal to third persons for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances and misfeasances, and omissions of duty of its operators in the course of their employment, and a sending of a message by the operator over the lines of the company, even though the message is forged or fraudulent, is within the scope of the employment of the operator who is employed to take charge of and operate the telegraphic instruments.[3] This rule is consistent with public policy and convenience, for in no other way could there be any safety to third persons in their dealings either directly with the principal, or indirectly with him through the instrumentality of the agent, and for that reason the law considers that the principal holds out his agent as competent and fit to be trusted. Thus where the agent of a telegraph company was also an express agent, and knew that A. was in the habit of sending money to B. by express, and telegraphed to A. in B.'s name to send on an amount of money, and when the money came to him through the express, seized it, and con-

[1] Rev. Stat., Sm. & Ben., § 3467. [2] Ann. Stat. § 2003.

[3] M'Cord *v.* Western Union Telegraph Co., 39 Minn. 181; Bank of California *v.* Western Union Telegraph Co., 52 Cal. 280; Stiles *v.* Western Union Telegraph Co., 15 Pac. Rep. 712.

verted it to his own use, the court held that the telegraph company was responsible, on the ground that this message was sent in the course of the employment of the agent, the court holding that any act done in the usual course of the employment of the servant, although it may not be done in the furtherance of the master's business, and may be a wilful, malicious, or fraudulent act of the servant, renders the master liable for the breach of duty, whether it be found in the contract or be a common-law duty growing out of the relations of the parties.[1]

§ 425. **Same Subject** (*continued*). — In a case where the operator of a telegraph company entrusted the business of sending messages at certain times when he was absent to an employee of his, and the employee telegraphed an order upon a bank in San Francisco, "Pay Charles H. Crowley $1200 gold," and signed it with the name of the cashier of a bank at the place where he was living, and then going himself to the bank to which the order was telegraphed with an acquaintance of his, who innocently but mistakenly identified him as being Crowley, his real name being Crowell, upon which identification the bank paid the money to Crowell, — the court held that the telegraph company was responsible to the bank, but placed it upon a somewhat peculiar ground. The court said that unquestionably the telegraph company would have been liable if the message had been sent by the operator himself; that, as the duty of a telegraph operator was highly confidential, he could not legally delegate this duty to another; and therefore the person who actually sent the telegram was not rightfully in the employ of the telegraph company, and the company could not be held responsible upon that theory; but that as the duty of a telegraph operator was not only to transmit messages in the course of his employment, but also to protect the telegraph instruments from use by unauthorized persons, if through his negligence

[1] M'Cord *v.* Western Union Telegraph Co., 39 Minn. 181.

the instruments had been used by an outsider for a fraudulent purpose, the company would unquestionably have been liable and, *a fortiori*, the fact that he voluntarily delivered over the instruments to the use of an outsider rendered the company liable for his neglect of duty in that regard.[1] A recent case has been decided in Arizona where the telegraph company was held liable. In this case a telegraphic message was received ordering the closing of a bankrupt bank in the town where the receiving operator was employed. The operator himself, having a deposit in this bank, withheld the message until he had gone over to the bank and drawn out his money. The court held that delaying the delivery of the message was a fraudulent act done by the agent or operator in the course of his employment, and therefore the telegraph company was responsible in damages to the receiver of the bank for the loss thereby occasioned.[2]

§ 426. **Negligence as Basis of Fraud.** — When a message is erroneously transmitted by a telegraph company the question whether the person by whom it is received may have an action against the telegraph company therefor is discussed at length in later sections.[3] It is sufficient to state here that in England such an action is not sustained by the courts, while in the United States it is generally upheld.[4] Such an action has also been supported in one State on the ground of false representations. In this case the facts were that the plaintiffs were in business in Boston, and had partners in San Francisco, and when the San Francisco partners desired goods of a certain kind, they telegraphed to the Boston firm to send the goods. The San Francisco

[1] Bank of California *v.* Western Union Telegraph Co., 52 Cal. 280.

[2] Stiles *v.* Western Union Telegraph Co., 15 Pac. Rep. 712.

[3] *Post*, §§ 460 *et seq.*

[4] *Infra*, §§ 460 *et seq*; Playford *v.* United Kingdom Electric Telegraph Co., L. R. 4 Q. B. 706; Dickson *v.* Reuter's Telegraph Co., 2 C. P. Div. 62, 3 C. P. Div. 1.

partners telegraphed the Boston partners to send three hundred and twenty-five seamless brass tubes. The telegraph company delivered the message properly to the plaintiffs, and then five days afterwards negligently delivered the same message again, thus causing the plaintiffs to send double the quantity of brass tubes ordered. The Boston firm brought suit against the telegraph company in three counts, the first alleging negligent mismanagement of the telegraph line, whereby a message was delivered to the plaintiffs which had never been sent, the second alleging a guarantee by the telegraph company of its authority to send the message delivered to the plaintiffs, and the third alleging a false representation of authority to deliver the message. The defendant demurred to the declaration principally on the ground of non-joinder of parties; but the court in overruling the demurrer as to the first and third counts said, "In an action against a telegraph company for delivering a message never sent, and alleging that the defendant falsely represented that it was authorized to deliver such a message, and thereby caused the plaintiff to send goods and suffer damage, it is not necessary to allege that it was done with intent to deceive, or that it was false within the knowledge of the defendant. It is not an action for deceit. It is an action in the nature of a false warranty against one acting as an agent, who represents that he has authority when he has not. Whether such representation is made in terms, or tacitly and impliedly, he supposing but not knowing the fact to be true, he is liable to the person misled.[1] Nor in such an action for false representations is it necessary for the plaintiffs to allege that they used due care and diligence to ascertain if the representations were true. Nor do any presumptions arise in this case from the subject-matter of the alleged false representations that make such an allegation

[1] Jefts *v.* York, 10 Cush. 392; Bartlett *v.* Tucker, 104 Mass. 336 and cases cited.

necessary."[1] The two grounds on which the decision in the above case was rested were as follows: First, that the telegraph company had made a representation to the plaintiffs which was false in fact, though not known to them to be false, nor made with intent to deceive; and second, that the telegraph company had falsely represented itself as having authority to deliver the order to the plaintiffs as agents of the California firm. Both of these grounds were considered in a case in England,[2] and not maintained, the court holding, on the authority of cases previously decided in England in other branches, that a statement which is false in fact, but not known to be false to the party making it, nor made with intent to deceive, will not support an action; and that as to the second ground, it would be unreasonable to hold that the telegraph company made any such representation as to its authority as an agent, — that it did not hold itself out as an agent having authority to contract, but was simply a forwarder of the message. This subject is not important in the United States, where, as has been said, the receiver of a telegraphic message erroneously transmitted is allowed an action against the telegraph company based on the duty of the telegraph company to transmit messages with due care.[3]

§ 427. **Fraudulent Messages by Third Parties.** — How far a telegraph company is bound to prevent the sending of forged or fraudulent messages over its lines by third parties, has been discussed in several cases. The principle which should decide such cases is the leading principle in regard to the operation of telegraph lines, *i. e.*, that the company must exercise reasonable care in its operation, and will be liable for negligence.[4] The most ordinary instance of such mes-

[1] May *v.* Western Union Telegraph Co., 112 Mass. 94.
[2] Dickson *v.* Reuter's Telegraph Co., 2 C. P. Div. 62.
[3] See *post*, §§ 460 *et seq.*
[4] Elwood *v.* Western Union Telegraph Co., 45 N. Y. 549.

sages is where a person uses the telegraph to request the forwarding of money to him, he assuming a fictitious name for this purpose. If there is anything suspicious about the telegram which reasonably ought to put the operator on guard and lead him to suspect some fraudulent design, then the company will be liable for loss caused by the fraudulent message. Thus, it has been held that the sending of a message guaranteeing the payment of drafts in the name of the cashier of a bank at the request of the party, who is thereby held out as entitled to credit for a large amount, without any evidence of said party's authority to use the name of the cashier, especially where the telegram bore an evidently false date, was an act of gross negligence for which the telegraph company was liable.[1] Whether, in the absence of any suspicious circumstances, the company must make any inquiry into the identity or *bona fides* of a person sending a telegram asking for money, or receiving a telegram authorizing the payment of money to him, does not seem to be well settled. On the one hand, the usual custom of banks not to pay money to unknown persons without requiring some identification, would seem to show that when a "valuable" telegraphic message is received, *i. e.*, one which authorizes the payment of money to an individual, the telegraph company should require some identification. On the other hand, it may be considered that the telegraph company makes no guarantee of the authenticity of the signatures of its telegrams, and that the party sending the money should make sure that the request therefor is a *bona fide* one. This latter rule was adopted in a case in Alabama in which the facts were that a message was sent by A. to B. requesting money, the telegram being falsely signed with the name of a relative of B. B. telegraphed in reply an order to the telegraph company to pay the money to the relative, naming him. The telegraph company, without inquiry, paid over the

[1] Elwood *v.* Western Union Telegraph Co., 45 N. Y. 549.

money to the impostor who simulated the relative, and the court held that, as there was nothing suspicious about the impostor, the telegraph company was not liable.[1] The court, however, was divided on this point, a majority holding that where there was nothing to create suspicion in the minds of the company's agents, it was for the party himself on whom the demand is made to ascertain whether he who makes it is the person he professes to be; and that the company has no right to refuse payment of the money to him in reply to whose message the order to pay is sent. Manning, J., however, said that he was strongly inclined to the other conclusion, but as the case was a new one, he deferred to the opinion of the majority. The reasoning of the majority of the court that because a person sends a telegram asking for money, therefore he is entitled to receive the money on receipt of it in answer, without investigation by the telegraph company, would seem to lack force. The real principle would seem to be that since the telegram ordering the payment of money directs it to be paid to a certain person by name, the telegraph company should take reasonable care to identify the person to whom it pays the money, as in reality the person whose name is given in the telegram. For instance, if a telegram orders the payment of money to X., and a person appears at the telegraph office claiming to be X., even though he has already sent a telegram asking money, and has signed it with the name X., since the sending of the first telegram is not proof of the identity of the person sending it, it would seem reasonable for the telegraph company to require identification before making the payment. On the other hand, if the person claiming the money produces sufficient *prima facie* proof of identity, it would seem reasonable that the telegraph company should be allowed to pay it over to him without liability, in accordance with the general principle governing

[1] Western Union Telegraph Co. *v.* Meyer, 61 Ala. 158.

the operation of telegraph lines, that the company is obliged to use only reasonable care.[1]

§ 428. **Substitution of Forged Message.** — The telegraph company, in a case which was decided in the Circuit Court of the United States, was held liable for its negligence upon the following facts. A person presented a draft at a bank, purporting to be drawn on a New York bank by a local bank. The bank to which the draft was presented telegraphed to the local bank to know if the draft was all right. The local bank telegraphed back that it had drawn no such draft. The person presenting the draft, however, through the negligence of the messenger boy at the terminal office, was able to substitute a forged answer in the envelope before it was delivered to the bank to which the draft was presented. The forged message stated that the draft was all right. The person presenting the draft thereupon was paid the money and went out of the State. The telegraph company tried to defend the suit on the ground that the bill was in fact endorsed by a responsible party from whom the bank might have collected the amount it lost. The court, however, held that this was not a good defence, as the loss occurred through the telegraph company's negligence, and that it therefore must make good the loss to the plaintiff, and could not compel the plaintiff to bring a lawsuit against the endorser to recover its loss prior to suing the telegraph company.[2]

[1] See also *post*, § 632.

[2] Strause *v.* Western Union Telegraph Co., 8 Biss. (U. S.) 104.

CHAPTER XX.

CONTRIBUTORY NEGLIGENCE IN SENDING TELEGRAMS.

§ 429. What is Contributory Negligence.
430. Wrong or Insufficient Address.
431. Other Instances of Contributory Negligence.
§ 432. Same Subject (*continued*).
433. Same Subject (*continued*).
434. Same Subject (*continued*).
435. Antecedent Negligence no Defence.

§ 429. **What is Contributory Negligence.** — As in other cases, where a person claims damages from another on account of the negligence of the latter, the rule as to contributory negligence of the plaintiff applies in actions against telegraph companies. A definition of contributory negligence has been given in a late telegraph case, as follows. "Contributory negligence consists in such acts or omissions on the part of the plaintiff amounting to a want of ordinary care, as, concurring or co-operating with the negligent acts of the defendant, are a proximate cause of the injury complained of."[1] As in other cases of negligence also, the question whether the plaintiff has been guilty of contributory negligence is generally a question of fact for the jury under proper instructions from the court, subject to revision by the court in cases where, the facts being undisputed or being settled by the verdict, a court can, as a matter of law, say that they do or do not raise a case of contributory negligence.[2]

§ 430. **Wrong or Insufficient Address.** — One of the clearest instances of contributory negligence is where a failure to deliver a telegraphic message is caused by the fact that the address given by the sender is wrong or insufficient. If this fact contributes to the failure of the telegraph company to

[1] Western Union Telegraph Co. *v.* Virginia Paper Co., 87 Va. 418.

[2] Western Union Telegraph Co. *v.* Stephens, 2 Tex. Civ. Ap. 129; and see *supra*, § 409.

deliver the message, the sender cannot recover damages therefor, since the failure was partly caused by his own negligence.[1] An instance of an insufficient address was where the message was addressed to "Mrs. X., Kankakee." When the message was brought by the sender to the telegraph office for transmission, the operator asked for a street and number for the address, but the sender replied that it was no matter about that; that Mrs. X. was a well-known woman in Kankakee, and the message would reach her. The message was then sent, but delivered to another person who was known by the name of Mrs. X., but whose real name was different. The place of delivery was a city of fifteen thousand inhabitants. The court held that addressing the telegram to the name of the person and the city, without a street or number, was contributory negligence.[2] This decision, however, has been somewhat modified by a recent case,[3] which holds that the question is for the jury in such a case.

§ 431. **Other Instances of Contributory Negligence.** — It has been held that if a person receiving a telegraph message has extrinsic information which leads him to suspect that the telegraph message as received by him may be incorrect, he is guilty of contributory negligence if he acts upon the telegram without making any effort to ascertain whether or not it is correctly transmitted.[4] In the absence of such information, however, it is not contributory negligence for the receiver of a telegram to act upon it without making any endeavor to ascertain whether it has been correctly transmitted or not. For instance, it is not contributory negligence for him not to have it repeated back to the sender.[5]

[1] Western Union Telegraph Co. *v.* Patrick, 18 S. E. Rep. 980; Western Union Telegraph Co. *v.* McDaniel, 103 Ind. 294; Deslottes *v.* Baltimore, etc. Telegraph Co., 40 La. An. 183.

[2] Western Union Telegraph Co. *v.* McDaniel, 103 Ind. 294.

[3] Western Union Telegraph Co. *v.* Smith, 21 S. E. Rep. 166.

[4] Western Union Telegraph Co. *v.* Wright, 18 Ill. App. 337.

[5] Harris *v.* Western Union Telegraph Co., 9 Phila. 88.

If the language of the message is ambiguous, and the person receiving the telegram gives it a wrong interpretation, this may be such contributory negligence as will prevent an action against the company. Thus, for instance, where H., in Germany, holding certain bonds, cabled to the plaintiff Hart, in New York, to inquire about the advisability of selling them, and the plaintiff telegraphed back a message, among other things containing the phrase "Hatch says hold undoubted," which phrase, as received in Germany was, "Hatch says sold undoubled," and H. interpreted this to mean an instruction to sell the bonds, and did so, the court held that his error in interpreting the unintelligible phrase could not be made a cause of action against the company.[1]

§ 432. **Same Subject** (*continued*). — Another instance of contributory negligence is where a message is sent summoning a physician to attend a sick person, and owing to the failure of the telegraph company to send it promptly, the arrival of the physician is delayed, and the sick person becomes worse or dies. In this case the fact that the person suing has unreasonably delayed sending another message or endeavoring to get another physician, may be a fact showing negligence contributing to the damages of which he complains.[2] So again if the plaintiff complains that owing to negligence of the telegraph company he did not receive a telegraphic message as soon as he should have, his own failure to act promptly upon the receipt of it may contribute to the damages of which he complains, and therefore relieve the telegraph company of liability therefor.[3]

§ 433. **Same Subject** (*continued*). — A case in which a question as to contributory negligence arose on peculiar facts was that of Western Union Telegraph Company *v.* Virginia

[1] Hart *v.* Direct United States Cable Co., 86 N. Y. 633. To the same effect, Nussbaum *v.* Western Union Telegraph Co., 42 Leg. Int. 16.

[2] Western Union Telegraph Co. *v.* Stephens, 2 Tex. Civ. App. 129.

[3] Western Union Telegraph Co. *v.* Lydon, 82 Tex. 364.

Paper Company.[1] The facts were that two messages were sent to the plaintiff, who was a member of the Straw Board Association, from a manager of the association, which was holding a meeting in a distant place, at which meeting the price of straw boards was being fixed. The first despatch announced that the price of straw boards had been advanced. The date of this despatch was the day before delivery. The second despatch, received by the plaintiff a few days later, and bearing date the day of receipt, announced that the old price had been restored. By mistake of the telegraph company, a duplicate of the first message was afterwards delivered to the plaintiff about midnight of the same day. This last message was stamped with the word "Dup.," and bore the same date as the first despatch. The telegraph company relied upon these facts to establish the fact that the plaintiff did not use ordinary care in examining the last despatch delivered to him; that if he had done so, he would have seen that it was marked duplicate and bore date earlier than the second despatch; and that if he had done so he would not have acted upon it as an original despatch. The court, however, held that the plaintiff had a right to rely upon the presumption that the last message delivered to him was an original despatch duly transmitted, and that his failure to notice the word "Dup.," and the date, was not such failure of ordinary care as would prevent him from recovering.[2]

§ 434. **Same Subject** (*continued*). — The question of contributory negligence was also discussed in a case in New York.[3] In this case the plaintiff owned and operated large salt works. He had agents in Chicago, and also a shipping agent in Oswego, his works being at Salina, New York. His agent in Chicago telegraphed, "Send five hundred sacks salt."

[1] 87 Va. 418.

[2] Western Union Telegraph Co. *v.* Virginia Paper Co., 87 Va. 418. Compare *ante*, § 426.

[3] Leonard *v.* New York, etc. Telegraph Co., 41 N. Y. 544.

This message was to the shipping agent in Oswego, and was delivered to him, "Send five hundred casks salt." In the trade "sacks" means fine salt, and "casks" means coarse. The agent consequently shipped the coarse salt. There was some further communication between the parties, but the shipment was not delayed, and reached Chicago where it found no market. The only question on appeal was the measure of damages, and also the question of whether the shipping agent might have stopped the shipment after receiving a telegram to that effect. As a matter of fact, the salt was in the harbor in the vessel the evening that the despatch was received, and did not sail until five o'clock the next morning, but this was not known to the agent. The court held, first, that there was no negligence on the part of the shipping agent, the telegram being received after he had every reason to believe that the goods had been sent; and, second, that he could not have stopped the vessel if he had seen her, as her chartering was already complete.

The question of contributory negligence was also discussed in a case in Pennsylvania. In this case the facts were that a message was dated from Quarantine, S. I., meaning Staten Island, and the telegraph operator wrote the letter C. over the I., so that the date read as if it were from Quarantine, S. C.; and plaintiff on receipt of message (which was one giving him information that a sister of his who had disappeared had been found drowned), after endeavoring to get at the telegraph operator, and finding the office closed, and then showing the telegram to a third party, who informed him that it was probably S. C., went down to South Carolina on a fruitless quest. The court held that there was evidence suitable to go to the jury, of negligence on the part of the telegraph company, and no conclusive evidence of negligence on the part of the plaintiff, and that the question of negligence was properly left to the jury.[1]

[1] Tobin *v.* Western Union Telegraph Co., 146 Pa. St. 375.

§ 435. **Antecedent Negligence no Defence.** — The principle which applies to other cases of contributory negligence also applies to the same doctrine in relation to telegraph messages, namely, that antecedent negligence of the plaintiff prior to the time when the negligent act of the defendant company occurs, will not affect the right of the plaintiff to recover. For instance, when the telegraph company is sued for late delivery of a telegram which it received about nine o'clock at night, and undertook to transmit and deliver, the fact that the sender of the telegram might have sent it earlier, and thus have procured its arrival in time to prevent the injury of which he complains, is not contributory negligence which will prevent his right to recover.[1] The subject of contributory negligence in the transmission of telegrams is closely connected with the necessity of a person who has been injured by the negligent act of the telegraph company to use all reasonable efforts to lessen his damages, failing in which he cannot recover that portion of the damage which he might have avoided by reasonable efforts upon his part.[2]

[1] Western Union Telegraph Co. *v.* Bruner, 19 S. W. Rep. 149. Compare also *ante*, § 366.

[2] Gulf, Colorado & Santa Fè Railway Co. *v.* Loonie, 82 Tex. 323. See *post*, §§ 619–630.

CHAPTER XXI.

DUTY OF SECRECY AS TO TELEGRAMS AND OTHER MATTERS.

§ 436. Penalties against Divulging of Telegrams.
437. Telegram must be produced in Evidence.
438. Identification of Despatch in Subpœna.
439. Protection of Telegrams in Transmission.
§ 440. Telegraph Operator exempt from Jury Duty.
441. Statutes exempting from Jury Duty.
442. Same Subject (*continued*).
443. Age and other Qualities of Operators.
444. Telegraph Operators running Trains.

§ 436. **Penalties against the Divulging of Telegrams.** — A peculiarity of the telegram distinguishing it from many modes of communication of intelligence, is that the contents of the telegram are necessarily known to the operators transmitting it. This fact, and the important nature of the communications often made by telegraph, render it of the highest importance that the operators should be bound by severe penalties not to divulge the information which they thus obtain. In some of the United States, express statutes have been enacted imposing penalties of fine or imprisonment upon operators who violate the duties of their occupation by divulging telegrams. The phraseology of the statutes varies in the various States, but the gist of the offence is complete when a clerk, operator, messenger, or other employee wilfully divulges to any but the person for whom it is intended, the contents of a telegraphic message or despatch intrusted to him for transmission or delivery, or the nature thereof. Statutes of this character exist in Arkansas,[1] California,[2] Colorado,[3] Florida,[4] Georgia,[5] Maine,[6] Maryland,[7] Michigan,[8]

[1] Dig. § 1826.
[2] Pen. Code, § 619.
[3] Mill's Ann. Stat. § 1392.
[4] Rev. St. § 2734.
[5] Laws 1889, No. 672, § 5.
[6] Rev. Stats. ch. 53, § 1.
[7] Pub. Gen. Stat. Art. 27, § 252.
[8] How. Ann. Stat. § 3708.

Minnesota,[1] Mississippi,[2] Nevada,[3] New Jersey,[4] New York,[5] North Carolina,[6] Ohio,[7] Oregon,[8] Pennsylvania,[9] Rhode Island,[10] Tennessee,[11] Wisconsin.[12]

§ 437. **Telegram must be produced in Evidence.** — The foregoing statutes, however, do not furnish the telegraph company an excuse for not producing telegraphic messages in court when the same are material to the trial of a cause, and are properly sought for by *subpœna duces tecum*. The telegrams are not privileged communications in such a sense as are communications between attorney and client and husband and wife, and the intent of the statutes above referred to is only to insure the secrecy of the communication except when the message may be required in a trial of a case, or by the government officials to assist in the prevention or detection of crime and the preservation of public order. This exception is expressed in two statutes,[13] and is implied in all others. It is therefore the rule that the production of telegrams in court may be secured by serving the proper subpœna upon the officer or employee who has them in his possession.[14] This is the rule even in States which have enacted statutes such as have been referred to in the preceding section, and, *a fortiori*, is the rule in States

[1] G. S. 1894, §§ 6782, 6783.
[2] Ann. Code, § 1301.
[3] Gen. Stat. § 992.
[4] Rev. p. 1176, § 12.
[5] 3 Rev. Stat., Birdseye, p. 3031, §§ 1, 2.
[6] Laws 1889, ch. 41, §§ 1 *et seq.*
[7] Rev. Stat., Sm. & Ben., § 3466.
[8] Hill's Ann. Stat. § 2002.
[9] Bright. Purd. Dig., p. 2001, § 15.
[10] Pub. Stats. ch. 242, § 39.
[11] Code, § 1541.
[12] Annot. St. § 4557.
[13] Cal. Pen. Code, § 619; Penn. Bright. Purd. Dig. p. 2002, § 16.
[14] Jaynes, *Ex parte*, 70 Cal. 683; Brown, *Ex parte*, 72 Mo. 83, 7 Mo. App. 484; Babcock *v.* United States, 3 Dill. 567; Hennisler *v.* Freedman, 2 Pars. Sel. Cas. 274; National Bank *v.* National Bank, 7 W. Va. 544; Dwight, *In re*, 15 Ont. 148; Woods *v.* Miller, 55 Ia. 168; United States *v.* Hunter, 15 Fed. Rep. 712; Anon., 3 N. J. L. 163; State *v.* Litchfield, 58 Me. 267. Even in England, where the telegraph is in the control of government officials, Tomline *v.* Tyler, 44 L. T. 187.

where no such restraining statutes exist.[1] Nor are the rules of the telegraph company forbidding disclosure of despatches of any avail when the telegrams are required in court, and are duly sought by subpœna.[2]

§ 438. **Identification of Despatch in Subpœna.** — There must be, however, a sufficient identification of the despatches required in the subpœna to enable the telegraph company to decide which are required. The subpœna cannot be used as a drag-net to bring into court all the despatches of a certain party between certain dates, so that counsel may ascertain which are material to the case. It is impossible to lay down any definite rule as to how close a description of the despatches wanted is necessary. It has been held that a demand for all telegrams received or sent by a certain party within a period of three months is too general, but the sufficiency of identification is a matter for the discretion of the court.[3] If the original telegram is lost or not produced by the other party on notice, the telegraph operator may be subpœnaed, and must give oral evidence of the contents of the message if he can remember them.[4]

§ 439. **Protection of Telegrams in Transmission.** — In addition to the protection of telegrams against disclosure by the operators, in many States statutes have been enacted to protect the messages from interception during transmission by third parties. This interception may be either by tapping the wires or by surreptitiously reading the despatch in the telegraph office, or otherwise fraudulently obtaining knowledge of the contents of the message. Statutes imposing penalties for such conduct are found in many States.[5]

[1] State *v.* Litchfield, 58 Me. 267.

[2] Brown, *Ex parte*, 72 Mo. 83; 7 Mo. App. 494; Anon. 3 N. J. L. 163.

[3] Brown, *Ex parte*, 72 Mo. 83; Jaynes, *Ex parte*, 70 Cal. 638.

[4] State *v.* Litchfield, 58 Me. 267.

[5] Ark. Acts 1885, Act 107, § 9; Cal. Pen. Code, § 640; Col. Ann. Stat. §§ 1394–1396; Conn. Stats. 1889, ch. 30; Ill. Stats. 1891, p. 205; Mich. Acts 1893, No. 113; Nev. Gen. Stats. § 927; Ohio Laws 1893, p. 346, § 1; Oregon, Hill's Ann. Stat. § 2007; Tenn. Code, § 1544.

In a few States statutes forbid the opening of sealed envelopes containing telegrams, except by the persons for whom they are intended,[1] or falsely representing the addressee of a telegram for the purpose of obtaining the telegram;[2] and in a few States statutes impose a penalty upon corrupt combination with the telegraph operator in the obtaining of information as to the contents of a despatch for the purpose of making use of it.[3]

§ 440. **Telegraph Operators exempt from Jury Duty.** — Owing to the great importance of having the telegraph instruments always ready for operation, not only for ordinary commercial telegrams, but for the important crises of life, such as illness, death, etc., and still more for the proper control of trains of steam cars, and the avoiding of accidents which interference with the telegraph lines of a railroad would cause, the legislatures of many States have passed statutes exempting telegraph operators from jury duty. The statutes are so short and so nearly alike that it is not necessary to set them forth in full.

§ 441. **Statutes exempting from Jury Duty.** — In the following States telegraph operators are exempt from jury duty. California (operator of a telegraph line doing a general telegraph business in the State),[4] Florida;[5] Georgia (all telegraph operators actually employed in sending and receiving telegraph despatches are relieved so long as they continue so engaged from all liability to jury duty in that State,[6] and all telegraph line repairers actually engaged in repairing telegraph lines are exempt from jury duty in any and all courts of that State. To avail themselves of this exemption, it is necessary for them to produce to the court the certifi-

[1] Cal., Col., Minn., Nev., N. C., and Oregon, statutes *supra*.

[2] Cal., Col., Oregon.

[3] Cal., Col., Ga., Minn., Miss., Nev., N. Y., N. C., Oreg., R. I., Wisc., see statutes *supra*. and § 436.

[4] Cal. C. C. P. § 200.

[5] Rev. Stats. § 1150.

[6] Ga. Code, § 3939.

cate of the manager or superintendent of the telegraph companies, certifying that the party or parties seeking exemption are line repairers, and actually engaged in repairing telegraph lines).[1] Louisiana (when engaged as such);[2] Minnesota (acting telegraph operators);[3] Mississippi;[4] Nevada (all operators, clerks, and persons in the employ of any telegraph company, whilst employed in the office of said company, or along the route of its telegraph lines).[5]

§ 442. **Same Subject** (*continued*). — New Jersey (the operators and assistant operators, superintendent, managers, linemen, and those directly engaged in the business of receiving and forwarding messages by telegraph);[6] New York (the operators, assistant operators, clerks, and other persons in the employ of the different telegraph companies in the State of New York, and while doing duty in the offices of said companies, or along the routes of their telegraph lines);[7] North Carolina;[8] Oregon (all operators, clerks, and persons in the employ of any telegraph company, whilst employed in the office of said company or along the route of its telegraph lines);[9] Pennsylvania (the operators, assistant operators, clerks, and other persons in the employ of the different telegraph companies in the State of Pennsylvania, while doing duty in the offices of said companies or along the routes of their telegraph lines);[10] Rhode Island;[11] South Carolina;[12] Texas;[13] Virginia (telegraph operators actually employed as such);[14] Washington (all operators, clerks, and persons in the employ of any telegraph company, whilst employed in the offices of said company or along the route of its telegraph

[1] Ga. Laws 1884, No. 438.
[2] Acts 1882, No. 42.
[3] Stats. of Minn. ch. 107, § 4.
[4] Code Annot. § 2356.
[5] Nev. Gen. Stat. § 931.
[6] N. J. Rev., p. 1176, § 14.
[7] 3 N. Y. Rev. Stat., Birdseye, p. 3035, § 17.
[8] Acts 1889, ch. 255.
[9] Hill's Annot. Stat. § 4167.
[10] Bright. Purd. Dig. p. 2002, § 17.
[11] Pub. Stat. ch. 200, § 2.
[12] Gen. Stat. § 2240.
[13] Rev. Stat. Art. 3014-16.
[14] Code, § 3140.

line);[1] West Virginia (actually employed as such in any office in this State);[2] Wisconsin (all telegraph operators and superintendents).[3]

§ 443. **Age and other Qualities of Operators.** — In a few States statutes have been enacted in reference to various minor points about telegraph operators. For instance, in California, any person who is intoxicated while acting as a telegraph operator receiving or transmitting despatches in relation to the movement of trains is guilty of a misdemeanor.[4] In Colorado and Georgia, operators despatching trains must be at least eighteen years of age, and have had one year's experience as telegraph operators, and in the latter State must have been thoroughly examined as to competency.[5] In Georgia and Maine, statutes exist relating to the discharge of operatives or the intimidation of operatives, being enacted to protect employees from violence or intimidation.[6] In New York it is provided by statute that the wages of telegraph and telephone employees must be paid in cash, and not in scrip or store money-orders.[7] In Ohio the hours of telegraph operators running trains are so limited that they must have eight hours rest in twenty-four consecutive hours, and ten hours constitute a day's work.[8] In Rhode Island, telegraph and telephone linemen are required to wear medals or badges conspicuously attached to their dress, on which shall be legibly inscribed the name of the owner thereof, and a number by which he can be duly identified.[9]

§ 444. **Telegraph Operators running Trains.** — The train despatcher of the railroad company, who sends his orders by telegram, is considered in the State courts to be a vice-

[1] Hill's Stats. & Codes, § 1567.
[2] Code, ch. 116, § 2.
[3] Sanb. & Berr. Annot. Stat. § 2525.
[4] Pen. Code, § 391.
[5] Col. Stats. 1891, Railroads, II. B., 309; Ga. Laws 1890, No. 148, § 1.
[6] Ga. Laws, 1890, Nos. 290, 779; Me. Rev. Stat. ch. 123, § 9.
[7] 1 Rev. Stat., Birdseye, p. 678, § 28.
[8] Laws 1891, p. 344, § 1.
[9] Pub. Stats. ch. 242, § 49.

principal, so far as the engineers and other employees are concerned, and his negligence will render the company responsible.[1] And this rule is in some States extended so far as to include all telegraph operators so far as they are concerned in running trains, because the telegraph service is a separate and distinct department in the operation of a railroad, and persons engaged in that service are not fellow-servants of the conductors, engineers, brakemen, and others in the immediate management and control of trains.[2] But in two cases it was held that a telegraph operator, in communicating telegraphic despatches as to the running of a train to the engineer from the chief train despatcher, was a co-employee with the engineers, conductors, and other trainmen in the running of the train.[3]

[1] Sheehan *v.* N. Y. C., etc. R. R. Co., 91 N. Y. 334; Dana *v.* Same, 92 N. Y. 639.

[2] Hill *v.* Railway Co., 39 Fed. Rep. 18; East Tenn., etc., R. R. Co. *v.* DeArmand, 86 Tenn. 75; Northern Pacific R. R. Co. *v.* Charless, 51 Fed. Rep. 567.

[3] Cincinnati, N. O. & T. P. R. Co. *v.* Clark, 57 Fed. Rep. 132; McKaig *v.* Northern Pacific R. R. Co., 42 Fed. Rep. 288.

CHAPTER XXII.

DUTY AS TO CONNECTING LINES.

§ 445. Transmission over other Lines.
446. Liability in Absence of Special Contract.
447. Special Contract exempting First Line.
448. Second Company not released by Special Contract of first Company, when.
§ 449. Usual form of Stipulation.
450. First Company handing to Second Company for Transmission.

§ 445. **Transmission over other Lines.** — The telegraph company is not at common law bound to receive messages for transmission for any points not on its own lines. It holds itself out to the public only for business on these lines, and cannot be required to extend that business unless the statutes of the State expressly command it to do so. In many States, however, statutes compel telegraph companies to receive messages for and from other companies whose lines connect, or in some cases come into the same town. These statutes have been considered in the chapter on Prohibition of Discrimination.[1] Moreover, telegraph companies often make traffic arrangements voluntarily with connecting lines in order to increase the volume of business and extent of mileage. It is therefore necessary to consider in this relation the rights, duties, and obligations of the successive lines, 1st, in the absence of special contract stipulations, and 2d, when varied by special contract stipulations.

§ 446. **Liability in Absence of Special Contract.** — When a telegraph company receives a message for transmission to a place not on its own lines, without any special agreement as to the mode of transmission, and accepts full payment for such transmission, it comes under a contract obligation to transmit the message to that place, and if it is obliged to

[1] *Supra*, §§ 385 *et seq.*

employ another company to do a portion of the transmission, this fact does not vary the liability of the first company, and unless it is protected by special stipulation, such as are now often printed in telegraph blanks,[1] it has the same liability for negligence occurring on the connecting lines as it has for negligence on its own lines.[2] But not only does the first company come under a contract obligation of transmission, but each succeeding company, by accepting the message in its turn, and taking its share of the payment for transmission comes under its usual legal duty and implied agreement to transmit and deliver with due care, and will be liable for negligence in these particulars.[3]

§ 447. **Special Contract exempting First Line.** — If the company which receives the message from the sender has upon its blanks the usual printed stipulation limiting its liability for negligence,[4] and also a clause that no liability is assumed for any error or neglect by any other company over whose lines the message may be sent to reach its destination, and if the courts of the State hold that such stipulations are

[1] *Post*, §§ 447, 448, *et seq.*

[2] De Rutte *v.* New York, Albany & Buffalo Telegraph Co., 1 Daly, 554; Western Union Telegraph Co. *v.* Shumate, 2 Tex. Civ. App. 429. In two cases in Canada, however, it has been held that the first company assumes only the obligation to deliver to the connecting lines, and has no liability for the negligence of the latter. Stevenson *v.* Montreal Telegraph Co., 16 Up. Can. Q. B. 530; Kinghorne *v.* Montreal Telegraph Co., 18 Up. Can. Q. B. 60.

[3] Leonard *v.* New York, etc. Telegraph Co., 41 N. Y. 570; Baldwin *v.* United States Telegraph Co., 45 N. Y. 749; Squire *v.* Western Union Telegraph Co., 98 Mass. 232; Western Union Telegraph Co. *v.* Smith, 26 S. W. Rep. 216; Conyers *v.* Postal Telegraph Cable Co., 92 Ga. 619; Martin *v.* Western Union Telegraph Co., 1 Tex. Civ. App. 143; De La Grange *v.* Southwestern Telegraph Co., 25 La. An. 383. Cf. Western Union Telegraph Co. *v.* Lyman, 3 Tex. Civ. App. 460. Cf. Thurn *v.* Alta Cal. Telegraph Co., 15 Cal. 473, to the effect that the second company is under no obligation to receive the message, but this is probably not now the law in many States under the statutes.

[4] This stipulation is discussed in chapter xxvi.

reasonable and valid,[1] the effect of them is to release the first company from responsibility for any negligence of a succeeding company.[2] Thus, for instance, under such a contract, if a message is sent from Boston to Buffalo, and the line of the company which receives the message for transmission terminates at Albany, and the message is then by it delivered to another line, which transmits it to its destination, and an unreasonable delay occurs in the delivery of the message by the latter company, the first line is exempted from liability by its contract.[3]

§ 448. **Second Company not released by Special Contract of First Company, when.** — It is, of course, possible for the first company to exact such a contract from the sender of the message as will release a succeeding company as well as itself from liability for negligence in those States where such contracts are recognized as reasonable and valid.[4] If the first company stipulates for exemption from liability for negligence on its own line, and also stipulates that it shall not be liable for errors or neglect occurring on other lines, this contract has been held by the courts to show on its face that it is not intended by the parties to apply to any except the first line. Consequently the second line receives the message under its common-law liability, and will be liable for the full consequences of its negligence.[5] This ruling is based on the phraseology of the exemption. In one case it has been held that when a special stipulation is inserted in the contract between the sender of the message and the first

[1] Cf. *infra*, §§ 509–537.

[2] Squire *v.* Western Union Telegraph Co., 98 Mass. 232; Western Union Telegraph Co. *v.* Munford, 87 Tenn. 190.

[3] Squire *v.* Western Union Telegraph Co., 98 Mass. 232. To the same effect, Western Union Telegraph Co. *v.* Carew, 15 Mich. 525. Cf. Western Union Telegraph Co. *v.* Jones, 81 Tex. 274.

[4] See *post*, § 449.

[5] Squire *v.* Western Union Telegraph Co., 98 Mass. 232; Martin *v.* Western Union Telegraph Co., 1 Tex. Civ. App. 149; Western Union Telegraph Co. *v.* Lyman, 3 Tex. Civ. App. 460.

company, exonerating that company from liability for negligence, this stipulation enures to the benefit of other succeeding companies, and that the sender cannot recover anything more from the connecting line than he could from the line originally receiving the message for transmission.[1] The case of Western Union Telegraph Company *v.* Taylor cited may perhaps be explained on the theory that the second company was successful in defending the suit, not because it had the benefit of any special contract, but because there was, in fact, no negligence, nor would have been any, if the suit had been against the first company; for the negligence complained of was non-delivery outside of the free delivery limited district which was established by a general regulation of the company, and which the courts have held to be reasonable, and to protect the telegraph company from liability for non-delivery.[2]

In another case in the same State the second company attempted to avail itself of the limitation of negligence contained in the contract between the sender and the first company; but the court evaded the question by holding that the clause did not apply to the facts in question in any event, since a repetition, as called for by that clause, would not have availed the sender at all, because the delay in transmitting the message arose from an erroneous address placed upon it by one of the operators; and that the correction of this mistake by transmission to another town out of the telegraph line was the cause of the delay; and that the mistake having been corrected, and the message sent to its proper destination, but delayed unreasonably by the detour caused by the incorrect address, a repetition, when it was received at the proper destination, would have been

[1] Western Union Telegraph Co. *v.* Taylor, 3 Tex. Civ. App. 311; *contra*, Smith *v.* Western Union Telegraph Co., 84 Tex. 359.

[2] See *ante*, §§ 416, 417.

too late, and, moreover, would not have disclosed any error.[1]

§ 449. **Usual Form of Stipulation.** — At the present time an ordinary form in which the exemption of the first company is phrased is, "and this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination," the phrase "without liability," being the phrase which conveys the exemption of the first company from liability for the negligence of succeeding companies.[2] The effect of this clause would be, it seems, that the sender of the message is bound by any stipulations as to exemption from negligence printed in the blanks of succeeding companies in the course of transmission, since his duly authorized agent (the first company) presents the message to the second company for transmission.[3]

§ 450. **First Company handing to Second for Transmission.** — The question as to the settling of liabilities when the company receiving the message from the sender, and, not having any line to the place of destination, makes no attempt to send it over its own lines, but sends it by messenger to a rival company's office to transmit, was discussed in a case in Massachusetts.[4] The facts were that the operator in the receiving office was absent when the message was there given by the sender to an office boy. When the operator returned, she at once saw that the message was directed to a place to which the company had no direct line, and therefore tore off the heading of the blank and sent the message to the office of the rival company, by whom it was transmitted. It was not written on a blank of the second company, but the terms

[1] Western Union Telegraph Co. *v.* Lyman, 3 Tex. Civ. App. 460. Compare *post*, §§ 525–527.

[2] Western Union Telegraph Co. *v.* Munford, 87 Tenn. 190.

[3] See Western Union Telegraph Co. *v.* Taylor, 3 Tex. Civ. App. 311, and cc. xxv., xxvi.

[4] Clement *v.* Western Union Telegraph Co., 137 Mass. 463.

and conditions of these blanks were well known to the plaintiff. The court held that the knowledge by the plaintiff of the regulations and conditions upon which the defendant company transacted its business was sufficient to affect him with these regulations, and to limit the liability of the defendant company thereby, although the message was not written upon one of its blanks.[1] The stipulations usually printed in telegraph blanks, and upon which the exemptions of telegraph companies from liability for negligence is based, are discussed in later chapters.[2]

[1] Clement *v.* Western Union Telegraph Co., 137 Mass. 463.

[2] *Post*, cc. xxv., xxvi.

CHAPTER XXIII.

NATURE OF THE LIABILITY OF THE TELEGRAPH COMPANY FOR NEGLIGENCE.

§ 451. Twofold Liability, Contract and Tort.
452. Implied Contract with Sender.
453. Express Contract with Sender.
454. Agency of Sender, Contract Liability.
455. Addressee as Principal of Sender.
456. Addressee as Beneficiary of Message.
457. Same Subject (*continued*).
458. No Liability in Tort to Sender of Message when Special Contract exists.
459. Tort Liability in Cases where no Special Contract.
460. Liability in Contract or Tort to Addressee.
§ 461. Same Subject (*continued*).
462. Same Subject. United States.
463. Statutory Duty.
464. Distinction between English and American Decisions.
465. Public Duty.
466. Obligation to use Due Care.
467. Common Agency of Telegraph Company.
468. Special Property in Message.
469. Changed Telegram as False Representation.
470. Profession of Authority as Agent.
471. Limit to Parties who may sue in Tort.
472. Limitation of the General Rule.
473. Rule as affected by Language of the Statute.

§ 451. **Twofold Liability, Contract and Tort.** — The preceding chapters have given a view of the duties and obligations of telegraph companies, both as imposed by statutes and as construed by the courts. In this chapter it is intended to examine the nature of the liability of telegraph companies for the breach of these duties, that is, by negligence in the transmission and delivery of messages, and this examination will include two aspects of the liability, or rather, two different liabilities, namely, that which arises from breach of the contract for transmitting the message, and that which arises from default in the statutory duties as to diligence of operation, etc., which have been previously considered. This examination of the nature of the liability is necessary, because in subsequent chapters it is proposed to consider the various special stipulations which telegraph

companies require their customers to assent to, and which vary materially in many particulars the liability of the telegraph company as imposed on it by the statutes and at common law. An incident to this examination will be the consideration of the right of the addressee of a message to sue the company for negligence in transmission or delivery, a right which has been much questioned by courts and text-writers.

§ 452. **Implied Contract with Sender.** — The contractual liability of a telegraph company to the sender of a message may be of two different kinds. First, it may arise from breach of an implied contract, and, second, it may arise from breach of an express contract. Considering the first, when a telegraph company simply accepts for transmission a message delivered to it orally or in writing, but without any special stipulations as to transmission, and receives payment for the transmission of the telegram, the law implies a contract to transmit and deliver, and the terms of the contract are the duties imposed upon the telegraph company by the law.[1] These duties have been considered previously, and are substantially to transmit and deliver the message with reasonable promptness and care,[2] without preference,[3] and without discrimination,[4] together with some other subordinate duties arising from these main duties.[5] If the telegraph company breaks the implied terms of this contract, either by negligence in transmission or delivery, the sender may have an action of contract on the implied agreement against the company for damages.[6]

[1] See cases, note 6, *infra*.

[2] *Supra*, cc xvii. to xix.

[3] *Supra*, ch. xiv.

[4] Ibid.

[5] *Supra*, cc. xxi., xxii.

[6] Stevenson *v.* Montreal Telegraph Co., 16 Up. Can. Q. B. 530; Aiken *v.* Western Union Telegraph Co., 5 S. C. 358; Kinghorne *v.* Montreal Telegraph Co., 18 Up. Can. Q. B. 60; Pearsall *v.* Western Union Telegraph Co., 124 N. Y. 265; Leonard *v.* New York, etc. Telegraph Co., 41 N. Y. 570; Baldwin *v.* United States Telegraph Co., 45 N. Y. 749; Squire *v.* Western Union Telegraph Co., 98 Mass. 232; Western Union

The allied liability in tort in such cases is discussed in a later section.[1]

§ 453. **Express Contract with Sender.** — Practically, in most cases, the sending of a message by telegraph is not begun by the delivery to the company of an oral message or a message informally written on ordinary paper; but the person desiring to send the message writes it upon one of the blank printed forms of the company, and then signs his name to the despatch, and delivers it to the company for transmission. These printed forms contain numerous special agreements and conditions which are intended to modify to a great extent the ordinary legal duties and liabilities of the telegraph company. Whether writing the message on such a blank and delivering it to the company forms an express written contract between the company and the sender which modifies, so far as the law allows, the liabilities of the parties in the manner therein stated, or whether these printed stipulations are only restrictions of the liability of the telegraph company by notice, is discussed in later sections.[2] The detailed effect of these modifications will also be considered in later sections.[3] It is sufficient for the present to say that in such a case, if the printed blank is held to be an express contract between the telegraph company and the sender of the message, then, for breach of this contract, the sender may have an action of contract.[4]

§ 454. **Agency of Sender, Contract Liability.** — This con-

Telegraph Co. *v.* Smith, 26 S. W. Rep. 216. Damages, however, cannot be entered on default as liquidated, but must be assessed. Smithson *v.* United States Telegraph Co., 29 Md. 162.

[1] *Post*, §§ 458, 459.

[2] *Post*, §§ 493–495.

[3] Cc. xxv., xxvi.

[4] MacAndrew *v.* The Electric Telegraph Co., 17 C. B. 3; Grinnell *v.* Western Union Telegraph Co., 113 Mass. 299; Redpath *v.* Western Union Telegraph Co., 112 Mass. 71; Aiken *v.* Western Union Telegraph Co., 5 S. C. 358; Passmore *v.* Western Union Telegraph Co., 78 Pa. St. 242; Wolfe *v.* Western Union Telegraph Co., 62 Pa. St. 83; Western Union Telegraph Co. *v.* Henderson, 89 Ala. 516; Western Union Telegraph Co.

tractual liability is not limited to the person who actually delivers the message to the telegraph company for transmission, even though he signs his name to the despatch, and is apparently the principal in the transaction; for although he writes, signs, and delivers the message to the telegraph company for transmission, he may be simply an agent of some other person. In such case the principal may sustain his action of contract against the telegraph company on the contract of transmission by proof of the agency, although the agency was not disclosed to the telegraph company at the time of sending the message, for the courts in this instance apply to telegraph cases the well-settled rule in the law of agency, that a principal, although not disclosed at the time of forming a contract, may, except in special instances, such as commercial paper and sealed instruments, afterwards make known the fact that the person who made the contract was his agent, and may sue upon the contract in his own name.[1] Thus, in a case in New York,[2] the principal, Milliken, sent a telegram to his agent in Paris making certain inquiries. The agent sent a reply addressed to "Mentor, New York," this being a fictitious address of the principal. The principal inquired at the telegraph office in New York if any telegram so addressed had been received by them, and was told that it had not. He then gave his real name and address, requesting them to forward him any telegram which might be received with that address, and they agreed to do so. The telegram was received but never

v. Dougherty, 54 Ark. 221; Western Union Telegraph Co. *v.* Fairbanks, 15 Ill. App. 600; Western Union Telegraph Co. *v.* Jones, 95 Ind. 228; Western Union Telegraph Co. *v.* Yopst, 118 Ind. 249; Hill *v.* Western Union Telegraph Co., 85 Ga. 425; Cole *v.* Western Union Telegraph Co., 33 Minn. 227.

[1] Milliken *v.* Western Union Telegraph Co., 110 N. Y. 403, 410; Leonard *v.* New York, etc. Telegraph Co., 41 N. Y. 544; Playford *v.* United Kingdom Electric Telegraph Co., L. R. 4 Q. B. 706; Harkness *v.* Western Union Telegraph Co., 73 Ia. 190; West *v.* Western Union Telegraph Co., 39 Kan. 93.

[2] Milliken *v.* Western Union Telegraph Co., 110 N. Y. 403.

delivered to the plaintiff. He thereupon brought suit, and the court held that he, as the undisclosed principal in the transaction, might sue on the contract with his agent in Paris, and that this rule was well settled as applied to telegrams. In another case the facts were that A., being plaintiff in a suit in a distant city, and employing B. as her attorney there, and also C. as her attorney in her town of residence, was expecting her case to come on for trial at a certain date. Her attorney at the place of trial telegraphed to her local attorney not to come, as the court had adjourned. The telegram was held at the place of residence three days before being delivered to her local attorney, and she, not receiving it, therefore started out with her witnesses for the court, and incurred considerable expense. The company defended, on the ground that the plaintiff had no privity of contract with either the sendee or the sender of the message; but the court held that the sender of the message was the agent of an undisclosed principal (the plaintiff), and therefore the plaintiff could sue on his contract by proving the agency.[1] In such actions the telegraph company may employ any defence which it might make to an action by the agent, provided the facts forming the defence occurred before the disclosure of the principal, such, for instance, as payments made to the agent on account of the contract before the disclosure of the principal.[2] In such a case it seems that the agent will be allowed also to maintain an action in his own name on the contract between himself and the telegraph company.[3] If at the time the message is received for transmission, and the charges paid, the person sending it informs the operator that he is acting as agent for a third party, the principal in such a case may, of course, maintain a suit on the telegraphic despatch in his own name.[4]

[1] Harkness *v.* Western Union Telegraph Co., 73 Ia. 190.

[2] Ibid.

[3] Story, Agency, § 396.

[4] Western Union Telegraph Co. *v.* Wilson, 93 Ala. 32; Kennon *v.* Western Union Telegraph Co., 92 Ala. 399.

§ 455. **Addressee as Principal of Sender.** — The principle laid down in the foregoing section has been used in many cases to sustain a right of action of contract by the person to whom a message is addressed for negligence in the transmission or delivery of the message. This question of the right of the person to whom a message is addressed to sue the telegraph company for negligence in its transmission or delivery, has been discussed in a great number of cases. The various views which have been advanced for and against such a right of action when it is claimed in tort will be discussed in later sections.[1] It is sufficient here to state that even those courts which go the furthest in refusing the addressee of a message a right of action against a telegraph company, admit that if he can show that the sender of the message was his agent, either disclosed or undisclosed, he may maintain an action of contract against the telegraph company upon the principles stated in the foregoing section.[2] The case of Milliken *v.* Western Union Telegraph Company,[3] the facts of which have been previously given, is a good instance of this class of cases. In such cases, as will be seen hereafter more fully, the contract stipulations on the printed form of telegraph blanks bind the plaintiff through his privity of contract just as much as they do the person who sends the telegram.[4]

§ 456. **Addressee as Beneficiary of Message.** — The principle stated in the foregoing sections has been still further extended in some States in favor of the person to whom a

[1] *Post*, §§ 460-473.

[2] Milliken *v.* Western Union Telegraph Co., 110 N. Y. 403; Aiken *v.* Western Union Telegraph Co., 69 Ia. 31; Western Union Telegraph Co. *v.* Wilson, 93 Ala. 32; Pennington *v.* Western Union Telegraph Co., 67 Ia. 631; Leonard *v.* New York, etc. Telegraph Co., 41 N. Y. 544; Playford *v.* United Kingdom Electric Telegraph Co., L. R. 4 Q. B. 706; Feaver *v.* Montreal Telegraph Co., 24 Up. Can. C. P. 258; Harkness *v.* Western Union Telegraph Co., 73 Ia. 190; West *v.* Western Union Telegraph Co., 39 Kan. 93.

[3] 110 N. Y. 403.

[4] *Post*, §§ 499-535, 537.

message is addressed. The obvious justice in many cases of maintaining such a right of action in behalf of the person to whom the message is addressed, has given rise to strenuous endeavors of the courts to find some basis for sustaining such an action in cases where the sender of the message incurred no substantial damage by the negligence of the telegraph company, but the addressee of the message did. In their endeavors to sustain such actions, the courts have made use of an extension of the foregoing principle, and have said that in cases where the message is wholly for the benefit of the person to whom it is addressed, the courts will presume that the message was sent by the sender as the agent of the person to whom it is addressed, and for whose benefit it is, and although there has been no previous appointment of the sender as agent, yet this will be presumed from the nature of the message, especially if the sending of the message is ratified by him afterwards, as, for instance, if the price of sending the message is paid by him to the sender, and therefore the addressee of the message may avail himself of this principle of agency and sue the company upon the contract of transmission entered into with the sender of the message.[1] On this theory it would seem to be immaterial, except upon the question of damages,[2] as to whether the telegraph company knew or did not know that the sender of the message was the agent of the person to whom it was sent, since, as has been above shown,[3] an undisclosed principal may sue upon the contract of his agent.

[1] Chapman *v.* Western Union Telegraph Co., 90 Ky. 265; Anderson *v.* Western Union Telegraph Co., 84 Tex. 17; Sherrill *v.* Western Union Telegraph Co., 109 N. C. 527; Martin *v.* Western Union Telegraph Co., 1 Tex. Civ. App. 143; Western Union Telegraph Co. *v.* Adams, 75 Tex. 531; Western Union Telegraph Co. *v.* Hope, 11 Ill. App. 289; Western Union Telegraph Co. *v.* Beringer, 84 Tex. 38; Young *v.* Western Union Telegraph Co., 107 N. C. 370; Markel *v.* Western Union Telegraph Co., 19 Mo. App. 80; Western Union Telegraph Co. *v.* Broesche, 72 Tex. 654; Butner *v.* Western Union Telegraph Co., 37 Pac. Rep. 1087.

[2] *Post*, ch. xxviii.

[3] *Supra*, § 454.

§ 457. **Same Subject** (*continued*). — This same class of cases is also sustained by the courts on the principle which is law in a few States, that a person for whose benefit a contract is made may maintain an action to compel the performance of it, although he is not a party to the contract, this being for the reason that he has a beneficial interest in the performance of the contract, and that the law will imply a promise on the part of the person whose action would be for his benefit to fulfil his contract in that respect.[1] To give the addressee the benefit of this rule, it must appear either from the language of the message or the circumstances under which it is sent, and which are known to the telegraph company, that the message is sent for the benefit of the addressee.[2] This rule has been applied principally in cases where the message did not relate to commercial proceedings, but to social or domestic affairs, such as sickness or death of relatives, in which cases the message was clearly for the benefit of the person to whom it was addressed. Moreover, in such cases, as the only damages incurred by any person from negligence in the transmission of the message are injuries to the feelings, the courts in some States, which hold that, in actions of tort, injuries to the feelings alone cannot be recovered, while in actions of contract, if nominal damages are recovered, injuries to the feelings may be included as a matter of aggravation, have used the above stated principle to enable the addressee of the message to maintain an action of contract, and thus work out substantial justice between the parties where an obvious failure of justice would otherwise result.[3] The principle that a third

[1] See cases *supra*, § 456, note 1; Western Union Telegraph Co. *v.* Hope, 11 Ill. App. 289.

[2] Cases *supra*, § 456.

[3] Martin *v.* Western Union Telegraph Co., 1 Tex. Civ. App. 143; Western Union Telegraph Co. *v.* Beringer, 84 Tex. 38; Western Union Telegraph Co. *v.* Adams, 75 Tex. 531; Sherrill *v.* Western Union Telegraph Co., 109 N. C. 527; Young *v.* Western Union Telegraph Co., 107

party benefited by a contract may sue on it is in many States not accepted as law, and in those States necessarily, this rule cannot be invoked in favor of the addressee of a telegraphic message. In one State where the courts hold that a person not a party to the contract cannot sue for its enforcement except where the contract is for the payment of money, this principle has also necessarily been abandoned in case of suits by the addressee for injury to the feelings.[1]

§ 458. **No Liability in Tort to Sender of Message when Special Contract exists.** — Returning now to the liability of the telegraph company to the sender of the message, and taking up the liability in tort. There is no liability of a telegraph company in tort to the sender of a telegram for negligence in transmission or delivery, in any case where an express contract for the transmission of the message is entered into by the parties, such, for instance, as is contained on the ordinary printed blank forms of the telegraph company, for in such a case the express contract supersedes the legal duty of the telegraph company in regard to the transmission of the message, and defines the rights of the parties. This principle is well stated by Professor Pollock in his admirable book on the Law of Torts, as follows: "Whenever there is a contract to do something, the obligation of the contract is the only obligation between the parties with regard to the performance, and any action for failure or negligence therein is an action on the contract, and this whether there was a duty antecedent to the contract or not."[2] And in ordinary practice, in those States where the distinction between actions of contract and actions of tort is maintained, it will be found that actions by the sender of a tele-

N. C. 370; Markel *v.* Western Union Telegraph Co., 19 Mo. App. 80; Butner *v.* Western Union Telegraph Co., 37 Pac. Rep. 1087.

[1] Western Union Telegraph Co. *v.* Wilson, 93 Ala. 32; Kennon *v.* Western Union Telegraph Co., 92 Ala. 399; Daughtery *v.* American Union Telegraph Co., 75 Ala. 168.

[2] Pollock, Torts, p. 437.

graphic message for negligence of the telegraph company in the transmission or delivery of the same, are generally actions of contract in cases where an express contract was made for the transmission.[1] There are, however, some cases in which the stipulations printed on the telegraph blanks are considered rather as regulations of the telegraph business, or restrictions of its common-law liability, and in such cases, as there is no express contract, an action of tort is allowable.[2]

§ 459. **Tort Liability in Cases where no Special Contract.** — It has already been seen[3] that in cases where no express contract is entered into by the parties for the sending of the message, an action of contract is maintainable upon the legal fiction of an implied promise of the company to perform its legal duty in transmission. This action is based upon the duty of the company to transmit imposed upon it by express statute in most States, and by inference from the nature of its employment in the few States in which no such statutes exist.[4] There is, however, in such cases, an alternative liability in tort to the sender of the message in cases where the company has defaulted in its duty of transmission, this liability arising from the undertaking of transmission. The principle on which these actions are maintained is well stated by Professor Pollock, as follows: "When there is an undertaking without a contract, there is a duty antecedent to the undertaking, and if it is broken there is a tort and nothing else. The rule that, if there is a specific contract, the more general duty is superseded by it, does not prevent the general duty from being relied upon when there is no contract at all."[5] The tort may be waived and an action of assumpsit brought on the fiction of an implied promise, as

[1] See cases *ante*, §§ 452, 453, and *post*, ch. xxvi.; and *passim*.

[2] See *post*, §§ 491, 495.

[3] *Ante*, § 452.

[4] *Supra*, §§ 320–349.

[5] Pollock, Torts, p. 436; Gladwell *v.* Steggall, 5 Bing. N. C. 733; Austin *v.* Great Western Ry. Co., L. R. 2 Q. B. 442.

has been shown above,[1] but the person injured by the default is not bound so to do, and may proceed in tort on the default of the company in its duty. The cases are not numerous in which no express contract for the transmission exists, most of the cases being, as was said in the preceding section, cases where the rights and liabilities are fixed by an express contract. A few cases, however, have been brought on the liability in tort. Thus in Lane *v.* Montreal Telegraph Company,[2] the action is described in the report as being "for incorrectly transmitting a telegraphic message," and the court in deciding upon the measure of damages speaks of them as "flowing from the breach of the defendant's duty or contract." Again, in Stevenson *v.* Montreal Telegraph Company,[3] the action is distinctly one of negligence as set forth in the declaration. No averment of a promise or contract of any kind is made, but the action is based wholly on the breach of duty on the part of the telegraph company, although the court discusses the case as one of contract. Again, in the case of Squire *v.* Western Union Telegraph Company,[4] the action was in "tort for neglecting to deliver a telegraphic message seasonably,"[5] and, on principle and authority, the sender may in such cases sue in tort for negligence of the telegraph company in performing the duty of transmission, or may waive the tort and sue in contract on the implied promise.

§ 460. **Liability in Contract or Tort to Addressee, English Cases.** — The liability of the telegraph company to the person to whom the message is addressed in cases of negligence is a matter of some difficulty. It is obvious that, except in the special cases mentioned in preceding sections,[6] there can be no contractual privity between the telegraph company and the person to whom the telegram is addressed, and, except in

[1] *Supra*, § 452.
[2] 7 Up. Can. C. P. 23.
[3] 16 Up. Can. Q. B. 530.
[4] 98 Mass. 232.
[5] See also *supra*, § 446.
[6] *Supra*, §§ 455, 456, 457.

those special cases, the contract of the telegraph company, whether express or implied, is with the sender of the message. On the question whether there is a liability in tort to the addressee, the courts have not been uniform. In England, the courts have settled the rule with great definiteness, that there is no liability either of tort or contract (except in cases of agency) on the part of the telegraph company to the person to whom the message is addressed, and this whether the injury complained of is the delivery of an erroneous message, or a failure to deliver the message at all, that is, whether it be a case of misfeasance or nonfeasance.[1] The question was first considered in the case of Playford *v.* United Kingdom Electric Telegraph Company, where the action was by the receiver for delivering a different message from the one sent by the sender, the error being a change in a price quoted in the message, whereby the receiver of the message was damaged; and the court were of the opinion that the obligation of the telegraph company to use due care and skill in the transmission of the message arises entirely out of the contract with the sender, and that the person to whom the message was sent had no right of action against the telegraph company arising out of the breach of any duty on the part of the telegraph company. The plaintiff sought to support his cause on a second ground, that he had a special property in the telegraphic message itself, and that, the message having been changed by the negligent transmission, a cause of action accrued to him for this change; but this ground was also denied by the court for the reason that no such property could, in the nature of things, exist in a telegraphic message.

§ 461. **Same Subject** (*continued*). — In a subsequent case,[2]

[1] Playford *v.* United Kingdom Electric Telegraph Co., L. R. 4 Q. B. 706; Dickson *v.* Reuter's Telegraph Co., 2 C. P. Div. 62, 3 C. P. Div. 1; Feaver *v.* Montreal Telegraph Co., 23 Up. Can. C. P. 150.

[2] Dickson *v.* Reuter's Telegraph Co., L. R. 2 C. P. Div. 62; 3 C. P. Div. 1.

where the injury complained of was the delivery to the plaintiff of a telegram which was intended for another person, the telegram being an order for goods, which order the plaintiff filled, and was damaged thereby, the rule in Playford's case was sustained. In the later case the plaintiff urged upon the court three grounds to support his action: first, that the telegram, as delivered by the company to the plaintiff, was a statement which was false to the knowledge of the telegraph company, at least in the sense that it had the means of knowing that it was false, the action being in the nature of an action for false representation, which, being acted upon by the plaintiff, led to his injury. The court, however, denied the validity of this ground, for the reason that it had been decided in that country in previous cases, in different kinds of actions, that an injury caused by a statement false in fact, but not so to the knowledge of the party making it, nor made with intent to deceive, will not support an action. The second ground urged by the plaintiff was that the telegraph company, in delivering a telegram for the sender, held itself out as being duly authorized to deliver the message as the agent of the sender, and that if it delivered a message which was not the message sent by the sender, this representation of its authority was false, and therefore the telegraph company should be held liable in the same way as a person who represents himself as authorized to enter into a contract as the agent of another is held to guarantee his authority. This ground, however, was denied by the courts, for the reason that, in the nature of things, the telegraph company does not act or profess to act as the agent of the sender of a message. It is merely a forwarder of the despatch. The third ground urged by the plaintiff was that the nature of the business carried on by the telegraph company was such as required extreme accuracy, and therefore, from its very nature, involved a liability for inaccuracy; but the court held that this would be imposing upon the tele-

graph company a liability inconsistent with the real understanding of mankind as to the duties the telegraph company undertakes and the liabilities it incurs, and would extend the primary undertaking of the telegraph company with the sender of the message into an implied undertaking with all mankind to guarantee every person against the consequences of the delivery of a message to the wrong party through any negligence of any one of its servants employed in the transmission of a message from the remotest part of the world. It is to be noted that in both these English cases there was no statute involved imposing any duty as to the careful transmission or delivery of messages upon the telegraph company. There was in Playford's case a statute requiring telegraphic apparatus to be "open for the sending and receiving of messages by all persons alike, without favor or preference." These two cases settled the law in England, as above stated.

§ 462. **Same Subject, United States.** — In the United States the English rule has not been generally adopted, and it may be said generally, as will be shown specifically in the following sections, that the telegraph company is liable to the person to whom the message is addressed for negligence in the transmission or delivery of the message.[1] A short exami-

[1] Smith *v.* Western Union Telegraph Co., 83 Ky. 104; Western Union Telegraph Co. *v.* Dubois, 128 Ill. 248; Western Union Telegraph Co. *v.* Hope, 11 Ill. App. 289; New York & Washington Printing Telegraph Co. *v.* Dryburg, 35 Pa. St. 298; Western Union Telegraph Co. *v.* Fenton, 52 Ind. 1; Western Union Telegraph Co. *v.* Landis, 21 Week. No. of Cas. 38; De la Grange *v.* Southwestern Telegraph Co., 25 La. An. 383; Western Union Telegraph Co. *v.* Longwill, 21 Pac. Rep. 339; Western Union Telegraph Co. *v.* Richman, 19 Week. No. of Cas. 569; Aiken *v.* Western Union Telegraph Co., 69 Ia. 31; Western Union Telegraph Co. *v.* Allen, 66 Miss. 549; Western Union Telegraph Co. *v.* Clifton, 68 Miss. 307; Lee *v.* Western Union Telegraph Co., 51 Mo. App. 375 (the message was about employer's business, and held that he could recover); Wolfskehl *v.* Western Union Telegraph Co., 46 Hun, 542; Bell *v.* Dom. Telegraph Co., 3 Leg. News, 405; Watson *v.* Montreal Telegraph Co., 5 Leg. News, 87; Mentzner *v.* Western Union Telegraph Co., 62

nation of the grounds upon which this liability may be maintained will now be made. Several distinct grounds have been brought forward which may be enumerated as follows. First, a statutory duty; second, a public duty; third, a common-law obligation; fourth, an obligation as agent of both parties; fifth, a special property of the addressee in the message; sixth, a liability as for a false representation; seventh, a representation of agency. These will be discussed in their order. The cases where the addressee was the principal, and the sender his agent, have been discussed above.[1]

§ 463. **Statutory Duty.** — It is an elementary principle of law that if a statute imposes a certain duty upon a person or corporation, and the person or corporation defaults in this duty, a person injured by this default may have an action against the party defaulting, if the courts are of opinion that the intention of the legislature as expressed in the language of the statute, was to allow such a remedy.[2] The question of whether such a remedy is intended by the legislature is a matter of construction for the courts.[3] In almost every State, as has been seen previously,[4] statutes have been passed enjoining upon telegraph companies in varied terms, but with substantially the same result, the exercise of diligence in the transmission and delivery of messages. These statutes, therefore, furnish a sufficient reason for the difference of decision between the English and the American courts on the point of liability of the telegraph company to

N. W. Rep. 1; Western Union Telegraph Co. *v.* Dubois, 29 Ill. App. 219; Western Union Telegraph Co. *v.* James, 90 Ga. 254; Western Union Telegraph Co. *v.* Reynolds, 77 Va. 173; Conyers *v.* Postal Telegraph Cable Co., 92 Ga. 619; Western Union Telegraph Co. *v.* Blance, 19 S. E. Rep. 255; Elsey *v.* Postal Telegraph Co., 15 Daly, 58.

[1] *Supra*, §§ 455–457.

[2] Pollock, Torts, pp. 23, 24, 168; Hardcastle on Statutes, pp. 115–121; Cooley on Torts, pp. 650–658.

[3] Pollock, Torts, p. 168.

[4] *Ante*, §§ 320–349.

the addressee of a message. The view of the American courts on this matter has been well stated in Ellis *v.* American Telegraph Company.[1] The statutes in the State of Massachusetts, where this case arose, provide that telegraph companies should "transmit the same (*i. e.*, messages), faithfully and impartially." The court says, "The leading feature of this enactment is that it in effect takes the business of conducting and managing a line of electric telegraph within this commonwealth out of the class of ordinary private occupations, and makes it a quasi-public employment to be carried on with a view to the general benefit, and for the accommodation of the community, and not merely for private emolument and advantage. Under this provision, an owner or manager of such a line becomes, to a certain extent, a public servant or agent." The court then proceeds to discuss the liability of the telegraph company, and after holding that the telegraph company is not liable as a common carrier or insurer of messages, says, "But although they ought not to be held to such a standard of diligence, they are not exempt from all responsibility for a want of fidelity and care in the exercise of the employment they undertake to carry on. There can be no doubt that, in the ordinary employments and occupations of life, men are bound to use due and reasonable care, and are liable for the consequences of carelessness and negligence in the conduct of their business to those sustaining loss or damage thereby. We can see no reason why this rule is not applicable to the business of transmitting messages by telegraph." This was an action brought by the addressee of the message for damages caused by an error in the message as transmitted.

§ 464. **Distinction between English and American Decisions.** — In the English cases it was said that the duty of a telegraph company is limited to a duty to the sender arising from the contract. In the United States it may be said, on

[1] 13 Allen, 226, 231.

the other hand, that there is a more extensive duty created by the statutes which supplements the duty arising towards the sender from the contract, and extends to the public at large, so far as they are effected by the transmission of the message, unless the language of the statutes shows a more limited intent. One objection of the English courts to allowing an action of tort by the addressee, as was stated above, was that such an action would extend the obligation of telegraph companies to a guarantee by the telegraph company to all mankind against its own negligence, and that there was no warrant for so extending the obligation. This extension is precisely what is effected by the statutes above referred to (provided their language does not indicate a more limited intent), which, by making the telegraph a public servant, and imposing upon it the duty of diligence in its operations, has extended its obligations commensurately with its privileges to all the public; and actions of tort by the addressee of a message for default on the part of the telegraph company in this public duty of using due care in the transmission and delivery of a message, may well be supported on this ground.[1] Whether the obligation extends to third parties is discussed in a later section.[2]

§ 465. **Public Duty.** — The duty of a telegraph company towards the addressee of a message arising from the public nature of the occupation, is in most States included in the

[1] Ellis *v.* American Telegraph Co., 13 Allen, 226; Smith *v.* Western Union Telegraph Co., 83 Ky. 104; Western Union Telegraph Co. *v.* DuBois, 128 Ill. 248; Western Union Telegraph Co. *v.* Hope, 11 Ill. App. 289; Western Union Telegraph Co. *v.* Fenton, 52 Ind. 1; De la Grange *v.* Southwestern Telegraph Co., 25 La. An. 383; Western Union Telegraph Co. *v.* Allen, 66 Miss. 519; Lee *v.* Western Union Telegraph Co., 51 Mo. App. 375; Western Union Telegraph Co. *v.* DuBois, 29 Ill. App. 219; Western Union Telegraph Co. *v.* James, 90 Ga. 254; Western Union Telegraph Co. *v.* Reynolds, 77 Va. 173; Mentzner *v.* Western Union Telegraph Co., 62 N. W. Rep. 1.

[2] *Post*, § 471.

statutory obligation above described, but there are a few States in which no statutes have been enacted expressly imposing upon telegraph companies duties to the public in the transmission and delivery of messages. In such States, however, a telegraph company is held to be none the less in a public employment,[1] and its obligation to use due care in the prosecution of this employment would seem to follow from the public nature of the employment in the same manner as all corporations or persons exercising such employments are held bound to use reasonable care.[2] In such cases, again, the situation of the telegraph company in the United States is so far different from that of the telegraph company in England that while in the latter country there might be no reason for extending the obligations of the telegraph company as to care beyond the sender of the message, in this country the duty should be co-extensive with the nature of the employment.

§ 466. **Obligation to use Due Care.** — In addition to the above grounds for sustaining the liability of a telegraph company in tort towards the addressee of a message, several other grounds for sustaining such actions in special instances exist. One ground exists in cases where the injury complained of consists in a delivery to the addressee of an erroneous telegram, the error being caused by the negligence of the telegraph operator. In such case the ordinary rule that a person who undertakes to perform any action for another is bound to use reasonable care and skill in the performance,

[1] *Supra*, §§ 5, 6.

[2] Smith *v.* Western Union Telegraph Co., 83 Ky. 104; Ellis *v.* American Telegraph Co., 13 Allen, 226; New York & Washington Printing Telegraph Co. *v.* Dryburg, 35 Pa. St. 298; Western Union Telegraph Co. *v.* Du Bois, 128 Ill. 248; Western Union Telegraph Co. *v.* Hope, 11 Ill. App. 289; De la Grange *v.* Southwestern Telegraph Co., 25 La. An. 383; Lee *v.* Western Union Telegraph Co., 51 Mo. App. 375; Western Union Telegraph Co. *v.* Du Bois, 29 Ill. App. 219; Western Union Telegraph Co. *v.* James, 90 Ga. 254; Western Union Telegraph Co. *v.* Reynolds, 77 Va. 173.

and will be liable for default therein, will be applied.[1] Familiar instances of this rule are cases of persons undertaking to act as physicians being held bound to use reasonable care and skill in their occupation.[2] It is true that until the telegraph company attempts to deliver the message to the person to whom it is addressed, it is not, under the English view, under any obligation at all to him in regard to the message; but it would seem that when it does actually deliver to him a written message, it is thereby performing an act affecting the receiver personally or pecuniarily in such a way as would bring it within the principle above stated.[3]

§ 467. **Common Agency of Telegraph Company.** — A ground which has been urged upon the courts in some cases to support the action of the addressee of a message for damages arising from negligence in the transmission or delivery thereof, is that the telegraph company may be considered, in a certain sense, the agent both of the sender and the receiver.[4] It is difficult to see in what sense the telegraph company may be considered the agent of the receiver of the message except in special cases where the sender is the agent of the receiver, or except as such agency may be founded upon the public duty of the telegraph company above declared, in which latter case this ground of support for the action by the addressee would be substantially the same as that already stated.[5] Except as thus supported, it is believed that this ground has no substantial foundation, and in fact the telegraph company does not occupy the position of an agent, although for convenience of phraseology it is sometimes thus spoken

[1] Ellis *v.* American Telegraph Co., 13 Allen, 226.

[2] See note to Playford *v.* United Kingdom Electric Telegraph Co., Allen's Telegraph Cases, p. 455.

[3] See also *post*, §§ 469, 470, New York & Washington Printing Telegraph Co. *v.* Dryburg, 35 Pa. St. 298.

[4] Aiken *v.* Western Union Telegraph Co., 5 S. C. 358.

[5] *Supra*, §§ 464, 465.

of. In reality the telegraph company is a mere forwarder of despatches as a public agent.[1]

§ 468. **Special Property in Message.** — Another ground which has been urged for the support of the action by the addressee is that he has an alleged special property in the message which will support an action by him if the message is changed, on the same principle that would allow a consignee to sue in case of damage to goods by a common carrier, in which he has a special interest. This ground, however, has been well disposed of by the English courts, as above stated,[2] and cannot be maintained, for there is no such special property in the message.

§ 469. **Changed Telegram as False Representation.** — Another ground upon which an action by the receiver of a message which has been changed in the course of transmission is supported is that when the telegraph company delivers to a person a message which is different from the message given to the company for transmission by the sender, the telegraph company in fact makes a representation to the receiver which is false, and which the telegraph company by the exercise of due care might have known to be false. This ground was urged upon the court in Dickson's case in England, and was rejected by the court in that case,[3] the court holding that it is essential in such cases that the representation should be either made with intent to deceive, or should be false to the knowledge of the person making it, neither of which conditions generally exists in cases for the delivery of erroneous messages. This ground is, however, sustained in at least one of the United States.[4]

§ 470. **Profession of Authority as Agent.** — Another ground which has been urged in support of an action by the addressee

[1] Playford *v.* United Kingdom Electric Telegraph Co., L. R. 4 Q. B. 706.

[2] *Supra*, § 460.

[3] *Supra*, § 461.

[4] May *v.* Western Union Telegraph Co., 112 Mass. 90; see *supra*, § 466; and see next section.

for damages caused by the delivery to him of an erroneous message by the telegraph company, is that the company by delivering the message in effect represents itself as being the duly authorized agent of the sender to deliver such a message, and that if the message delivered is not the message which it was authorized to deliver, this presents a case similar to one where a person professing to be an agent for the formation of a contract is in fact not authorized to make the contract; in which case he is held personally liable to the person with whom the contract is made, on the ground that he, having represented himself as authorized to make it, is personally responsible for any injury caused by this false representation. This ground was brought before the courts in Dickson's case,[1] and there rejected. It was, however, sustained in a case in Massachusetts.[2] In this case the plaintiffs, being a firm transacting business in Boston, and having a branch firm in San Francisco, received a telegram from the branch firm ordering certain brass tubes. The telegraph company delivered this message properly, but, by negligence of its operators, repeated the delivery five days afterwards. The plaintiffs supposing this second delivery to be another message ordering additional tubes, forwarded the same, and thereby were damaged. They brought suit for the damages, and the defendant demurred. There were three counts to the declaration: the first alleging simply negligence; the second alleging that the defendant promised the plaintiffs that it was authorized by the San Francisco firm to send the message, and alleging a breach of this promise; and the third alleging that the defendant falsely represented that it was authorized to deliver the message, and caused the plaintiffs to send the goods and suffer damage. The court sustained the demurrer as to the second count, alleging the promise, but overruled it as to the first

[1] *Supra*, § 461.

[2] May *v.* Western Union Telegraph Co., 112 Mass. 90.

and third. The court held that in such an action for false representation of authority to deliver a message, it is not necessary to allege that it was done with intent to deceive, or that the representation was false within the knowledge of the defendant.

§ 471. **Limit to Parties who may sue in Tort.** — Considering it well settled in the United States that the addressee of a message may sue in tort for negligence in the transmission or delivery of the message, his action being based upon the default of the telegraph company in the performance of its duty at common law and by statute as a public transmitter of telegraphic messages, yet it does not seem settled that this principle will be extended to other parties injured by the same default. Thus it was held in a case in Louisiana, where the facts were that certain sugar planters needing bisulphate of lime sent to a country storekeeper to buy some, and he, not having any, telegraphed to a New Orleans merchant to send some on, and the telegram, through the negligence of the telegraph company, was never delivered, — that the sugar planters could not recover, although they were injured by this negligence, because they were not in sufficient privity with the contract for sending the telegram to entitle them to recover.[1] This decision may perhaps better be supported upon the fact that the negligence of the telegraph company in not sending the message was not the proximate cause of the damages to the sugar planters, a principle which will be discussed later.[2] In a case in Indiana, however, under the statute of that State, the action was extended in favor of a third person who was not either the sender or receiver of the message, nor the principal of either.[3] In this case the message was sent by A. to B., asking him to employ C. The message was not delivered to B., as the messenger could

[1] Deslottes *v.* Baltimore, etc. Telegraph Co., 40 La. An. 183.

[2] *Post*, §§ 574–581.

[3] Western Union Telegraph Co. *v.* McKibben, 114 Ind. 511.

not find B. at his office or his house. The operator at the receiving office then told the messenger to find C., and an attempt was made to do this, but was not successful. The receiving office then sent back a message to the sending office saying that the message could not be delivered, and this second message was transmitted to A., who thereupon assented to the non-delivery, and made no further efforts to reach B. C. afterwards brought suit, and the telegraph company defended on the ground that it had employed all reasonable diligence to find both B. and C.; that C., not being either the sender or the receiver of the message, had no right to sue for damages; and that the contract with A. exempted the company especially from any suit for damages unless claim was made for the same within a certain time limit. The court overruled all the defences, holding that C.'s right of action was based on the fact that under the statute he was a person injured by the non-transmission of the message, and that his right of action thus accruing could not be affected by any stipulations in the contract between A. and the telegraph company, nor did it depend upon a contract relation with the telegraph company; and that, furthermore, the fact that A. had afterwards assented to the non-delivery of the message to B. did not affect C.'s right of action unless A. were considered to be the agent of C. for the purpose, and this agency did not appear to be sustained by anything in the facts.

§ 472. **Limitation of the General Rule.** — Although, as has been seen in the United States, the courts have in most States established the rule that the addressee of a telegraphic message may maintain an action of tort for the negligence of the company in its transmission, yet the decisions are not wholly uniform on this point, and it may be considered in some States to be still an open question whether such an action would be maintained at all, and if so, in what cases. The federal courts seem inclined to follow the English rule

to a certain extent, and to hold that such an action cannot be maintained in cases of mere non-feasance.[1]

§ 473. **Rule as affected by Language of the Statute.** — As this rule depends generally upon statutory provisions imposing the duty of care upon telegraph companies, it may be modified by the language of the statute. In several States, as will be seen by reference to the preceding chapter where the statutes are set forth at length, the receiver of a message is, by the express language of the statute, named as a party having a remedy against the telegraph company.[2] On the other hand, the language of the statute may restrict the remedy to the sender of the message.[3] Thus, it has been held in Indiana, where an action was brought upon a penal statute by the person to whom the message was sent, that the sender of the message is the only person who is entitled, under that statute, to sue the telegraph company for the penalty.[4] In the case of Western Union Telegraph Company *v.* Kinney the facts were that the plaintiff, who was intending to leave his residence for a time, told his son to forward to him any telegrams which might be received addressed to him. A message was received after the departure of A., and the son forwarded it *verbatim*, using the signature of the original sender, but changing the date of the message to the place where the son was and A. resided. The message was not delivered promptly, and A. brought suit for the statutory penalty. The telegraph company defended on the ground that A. was not, in fact, the sender of the message, and that the only person who could recover the statutory

[1] Western Union Telegraph Co. *v.* Wood, 6 C. C. A. 432.

[2] See *supra*, §§ 320–349.

[3] Western Union Telegraph Co. *v.* Kinney, 106 Ind. 468; Western Union Telegraph Co. *v.* Scircle, 103 Ind. 227; Hadley *v.* Western Union Telegraph Co., 115 Ind. 191.

[4] Western Union Telegraph Co. *v.* Kinney, 106 Ind. 468; Western Union Telegraph Co. *v.* Reed, 96 Ind. 195; Western Union Telegraph Co. *v.* Scircle, 103 Ind. 227.

penalty was the actual sender. It may be questioned whether this was a correct decision, for the son was, in fact, the agent of the father, and the sending of the message by him with the changed date was, under the circumstances, the same as if he had telegraphed in his own name to the following effect, "I have just received a message from So-and-so as follows." This decision shows that the original sender of the message is considered the party to whom the statutory penalty accrues.[1] In a later case in the same State suit was brought by the receiver of the message for the statutory penalty, a new statute having in the mean time been passed which provided that the action might be brought by "any party aggrieved" by the negligence. The court, however, held that the later statute was not meant to change the class of persons to whom the remedy was given, and that the phrase "party aggrieved" must be considered to mean the same as the words of the original statute.[2] The court, however, intimated that the person receiving the message might, in such a case, have an action for special damages under another section of the statute which created such a right of action.

[1] Western Union Telegraph Co. *v.* Kinney, 106 Ind. 468.
[2] Hadley *v.* Western Union Telegraph Co., 115 Ind. 191.

CHAPTER XXIV.

PENAL STATUTES AS TO TELEGRAMS.

§ 474. Nature of the Liability.
475. Penal Statutes construed strictly.
476. Instances of Construction.
477. More liberal Construction.
478. No Penalty for harmless verbal Errors.
479. Bad Faith, Partiality.
480. Failure to Transmit.
481. Prepayment of Toll, Waiver.
482. Statutory Liability cannot be Avoided by Contract.
§ 483. Void Contract.
484. Statute not effective outside of State.
485. Constitutionality of Statute.
486. Change in Penal Statutes.
487. Effect of Repeal on Right of Action.
488. Averments necessary in Action.
489. Defence by Company.
490. Jurisdiction of Action.

§ 474. **Nature of the Liability.** — In many of the States the statutes relating to the operations of telegraph companies, which have been given in full in a previous chapter,[1] enact that a default of the company in the performance of its duties thereunder shall give rise to a penalty or forfeiture on its part of a certain sum, which may be recovered either wholly or partially by the person injured by the default. Several points have been ruled by the courts in relation to actions brought on these statutes, which vary from the ordinary rulings in actions of either contract or tort, and give this liability of the telegraph company somewhat peculiar features. The statute which has received the fullest judicial construction, so far as its penal character is concerned, is the statute of Indiana, which is given in a preceding section.[2] In the following sections will be given such rules as have been decided especially with reference to this class of actions.

§ 475. **Penal Statutes construed strictly.** — All the statutes referring to the duties and obligations of telegraph companies in the transmission and delivery of messages, which

[1] *Supra*, ch. xv. [2] § 327.

inflict a penalty upon the telegraph company for failure to comply with the requirements, are construed strictly like all other penal statutes, and will not be extended by construction to include cases which do not fall within the language of the statute.[1] Thus an act which imposes a penalty on telegraph companies for refusing to *transmit* over its wires to localities on its line any message tendered for transmission, will not be held by construction to include a penalty for refusal to *deliver* the message.[2]

Neither will such a statute give a right of action for the penalty against a telegraph company for the wilful disclosure by one of its employees of the contents of a telegram. This is by statute generally made a criminal offence subject to fine;[3] but it is held that the penal statute which simply requires the transmission of messages with good faith and without partiality cannot be enlarged by construction so as to prohibit a wilful disclosure of a message.[4]

§ 476. **Instances of Construction.** — It has, however, been held that a statute imposing a penalty for failure to transmit and deliver messages with due diligence covers a case of *delay* in transmitting, even though another statute limits the obligation of telegraph companies to deliver messages free to a certain distance from its own office, the place addressed being in this case outside of the delivery district, for the statute as to delivery limits only the duty imposed by the penal statute as to delivery, and does not affect the scope of the statute as to the transmission of the message.[5] It has

[1] Brooks *v.* Western Union Telegraph Co., 56 Ark. 224; Western Union Telegraph Co. *v.* Axtell, 69 Ind. 199; Western Union Telegraph Co. *v.* Wilson, 108 Ind. 308; Connell *v.* Western Union Telegraph Co., 108 Mo. 462; Rogers *v.* Western Union Telegraph Co., 78 Ind. 169; Western Union Telegraph Co. *v.* Mossler, 95 Ind. 29; Langley *v.* Western Union Telegraph Co., 88 Ga. 777; Wilkins *v.* Western Union Telegraph Co., 68 Miss. 6.

[2] Brooks *v.* Western Union Telegraph Co., *supra*. Cf. *post*, § 480.

[3] *Supra*, § 436 *et seq.*

[4] Western Union Telegraph Co. *v.* Bierhaus, 8 Ind. App. 563.

[5] Horn *v.* Western Union Telegraph Co., 88 Ga. 538.

been held, under a statute which inflicts a penalty upon "telegraph companies engaged in the business of telegraphing for the public for hire," that a complaint under the statute which alleges that the telegraph company in question is engaged in the business of transmitting telegraphic messages for hire, is not sufficient since it leaves out the necessary allegation that the business is done for the public.[1]

§ 477. **More liberal Construction.** — Yet since these statutes are meant to regulate the operations of the telegraph company for the good of the public, it has been said in some cases that they are not to be considered strictly penal in their nature, and that they should be construed strictly, yet equitably[2] and reasonably, so as not to defeat the plain intent of the legislature.[3]

§ 478. **No Penalty for harmless verbal Errors.** — In view of the fact that under the provisions of a penal statute enforcing the obligation of care in transmitting messages the plaintiff may recover the penalty without having suffered any substantial damage, the courts have in recent cases been inclined to restrict the operation of such statutes by limiting the scope of the statute to promptness in transmission, or by holding that the penalty is not incurred by verbal mistakes in the transmission of a message which are harmless, and do not cause injury to the complainant, and this even where the statute provides that messages must be transmitted with due diligence, leaving the person injured by such verbal error to his remedy by civil action against the telegraph company.[4]

§ 479. **Refusal, Bad Faith, Partiality.** — In construing penal statutes, as above stated,[5] the courts construe them strictly,

[1] Western Union Telegraph Co. *v.* Axtell, 69 Ind. 199.

[2] Western Union Telegraph Co. *v.* Gougar, 84 Ind. 176.

[3] Western Union Telegraph Co. *v.* Hamilton, 50 Ind. 181.

[4] Western Union Telegraph Co. *v.* Rountree, 92 Ga. 611; Wolf *v.* Western Union Telegraph Co., 19 S. E. Rep. 717; Western Union Telegraph Co. *v.* Clarke, 71 Miss. 157.

[5] § 475.

and hold that a person seeking to recover the penalty must bring himself within the letter and spirit of the statute. For this reason it is held that when the statute provides a penalty for *refusal* to transmit a message, the plaintiff cannot recover his penalty by evidence showing a mere *negligence* in the transmission. He must show the actual refusal by the company to receive and transmit the message.[1] But it is generally held that allegations of lack of good faith and delivery out of order are not essential in an action under a statute which prescribes transmission in good faith and in order of receipt, as well as with due diligence, since the gist of the statute is the transmission with due diligence.[2] So under a similar statute, where the offence was a total failure to transmit a message, it was held that it was not necessary to allege bad faith, in an action brought for damages caused by the failure to transmit; that the duty under the statute was threefold: 1st, to transmit; 2d, to transmit with impartiality; 3d, to transmit with good faith, and that a failure in the first respect was sufficient to incur the penalty.[3]

§ 480. **Failure to Transmit.** — The statutes which provide a penalty for failure to transmit messages with promptness have been subject to the consideration of the courts in a few cases, upon the question whether the phrase "failure to transmit" includes a failure or negligence in the delivery as well. Under a statute providing a penalty for failure to transmit, it was held in earlier cases that the transmission included by construction delivery also.[4] But in other and better cases, under statutes imposing such a penalty on a telegraph com-

[1] Frauenthal *v.* Western Union Telegraph Co., 50 Ark. 78.

[2] Western Union Telegraph Co. *v.* Ward, 23 Ind. 377; Western Union Telegraph Co. *v.* Gougar, 84 Ind. 176.

[3] Burnett *v.* Western Union Telegraph Co., 39 Mo. App. 599.

[4] Little Rock & Fort Smith Telegraph Co. *v.* Davis, 41 Ark. 79; Brashears *v.* Western Union Telegraph Co., 45 Mo. App. 433 (but this was overruled in a later case, Dudley *v.* Western Union Telegraph Co., 54 Mo. App. 391); Western Union Telegraph Co. *v.* Gougar, 84 Ind. 176.

pany, it has been held that a refusal or neglect to deliver the message after it had been duly transmitted over the wires to the place to which it had been addressed, was not included within the statutory penalty.[1] And it has been held that a statute which simply provides a penalty for failure to transmit is not broad enough to cover an erroneous transmission.[2]

§ 481. **Prepayment of Toll, Waiver.** — These statutes being penal, it is held that if the duty of the telegraph company to transmit is declared to be conditional upon the prepayment of the charges of transmission, the company will not be liable for the penalty under the statute unless the charges are prepaid or tendered by the sender, or unless there was failure to deliver or delay in delivery on or after prepayment or tender by the person to whom the message was sent, or his agent.[3] So also, if a message is sent over the telegraph requiring a reply, and the charge for this reply is to be collected from the person who sends the original telegram, the person who sends the answer cannot recover the statutory penalty for negligence or error in the transmission or delivery of the message, if the statute requires a payment or tender of the charges of the telegraph company before the duty of transmission is imposed upon the company, and no such payment or tender has been made. The fact that the company waives this right and sends the message without requiring payment in advance, is not equivalent to the payment or tender which is necessary under the terms of the statute.[4] Nor is a tender which is withdrawn sufficient.[5] But if the

[1] Brooks *v.* Western Union Telegraph Co., 56 Ark. 224; Connell *v.* Western Union Telegraph Co., 108 Mo. 459; Dudley *v.* Western Union Telegraph Co., 54 Mo. App. 391.

[2] Wilkins *v.* Western Union Telegraph Co., 68 Miss. 6.

[3] Langley *v.* Western Union Telegraph Co., 88 Ga. 777; Western Union Telegraph Co. *v.* Mossler, 95 Ind. 29.

[4] Western Union Telegraph Co. *v.* Mossler, 95 Ind. 29.

[5] Western Union Telegraph Co. *v.* Power, 21 S. E. Rep. 51.

payment be made, refunding the money will not release the company.[1]

§ 482. **Statutory Liability cannot be avoided by Contract.** — The courts have held that a telegraph company cannot escape liability for the statutory penalty by any stipulation in the telegraph blank or contract limiting its liability for negligence or misconduct. The statute, being penal, overrides the contract not only when the action is brought by the receiver of the telegram, but by the sender, with whom the company has a contract relation.[2] When a statute simply declares the duties and liabilities of telegraph company in respect to negligence without imposing any penalty, it is in many States held that, in an action brought for special damages, the special contract limits the statutory duty.[3]

§ 483. **Void Contract.** — The right to recover the statutory penalty rests upon a valid contract or obligation for the transmission of the message. Therefore if the contract for transmission is void, or if there is no obligation of transmission, as if the message is delivered to the telegraph company on Sunday, the sender cannot recover the penalty for failure to transmit.[4]

§ 484. **Statute not effective outside of State.** — The statutes of a State imposing penalties upon telegraph companies for negligence in the transmission or delivery of a telegram, or for breach of other statutory duties, have no force and effect beyond the limits of the State in which they are enacted, for the reason that if they were allowed extraterritorial force

[1] Western Union Telegraph Co. *v.* Moss, 21 S. E. Rep. 63; Western Union Telegraph Co. *v.* Buchanan, 35 Ind. 429; Western Union Telegraph Co. *v.* Brightwill, 21 S. E. Rep. 518.

[2] Western Union Telegraph Co. *v.* Young, 93 Ind. 118; Western Union Telegraph Co. *v.* Adams, 87 Ind. 598; Western Union Telegraph Co. *v.* Buchanan, 35 Ind. 429; Western Union Telegraph Co. *v.* Meredith, 95 Ind. 93; Burnett *v.* Western Union Telegraph Co., 39 Mo. App. 599.

[3] Western Union Telegraph Co. *v.* Fenton, 52 Ind. 1; see *post*, § 514.

[4] Rogers *v.* Western Union Telegraph Co., 78 Ind. 169, see *supra*, §§ 354–368.

they would constitute an interference with interstate commerce, as has been seen in previous sections.[1] Accordingly, it is generally held that if the wrongful act for which the penalty is claimed took place without the State, the penalty cannot be recovered.[2] In Indiana, however, by a curious series of decisions, the courts have been led to hold that the test of whether the penalty can be recovered is the question where the contract for transmission is made; for they say that the action for the penalty depends upon a default or breach of the duty of transmission created by the contract entered into with the sender of the message, and that the question whether or not a breach has occurred must be decided where the contract was made, no matter where the wrongful act constituting the breach took place,[3] and if the contract for transmission was made outside the State, and the default occurs within, *e. g.*, delay in delivery, no penalty accrues.[4]

§ 485. **Constitutionality of Statute.** — The result of this test is that, if the message was delivered to the telegraph company in Indiana for transmission to a point outside the State, and delay or error occurs in the delivery at such point outside the State, the courts of Indiana will nevertheless hold that the sender of the message may recover the penalty because the breach of contract is considered to have taken place where the contract was made, that is, in Indiana.[5] This evidently results in the statute of Indiana being given an extraterritorial force and becoming a regulation of the

[1] *Supra*, §§ 51, 416, 417; Western Union Telegraph Co. *v.* Pendleton, 122 U. S. 347.

[2] Connell *v.* Western Union Telegraph Co., 108 Mo. 459.

[3] Carnahan *v.* Western Union Telegraph Co., 89 Ind. 526; Western Union Telegraph Co. *v.* Meredith, 95 Ind. 93; Western Union Telegraph Co. *v.* Reed, 96 Ind. 195; Western Union Telegraph Co. *v.* Ferris, 103 Ind. 91.

[4] Rogers *v.* Western Union Telegraph Co., 122 Ind. 395.

[5] Western Union Telegraph Co. *v.* Meredith, 95 Ind. 93; Western Union Telegraph Co. *v.* Pendleton, 95 Ind. 12; Western Union Telegraph Co. *v.* Ferris, 103 Ind. 91.

deliveries of telegrams in other States, and therefore an interference with interstate commerce. The Supreme Court of the United States has for this reason been obliged to declare the statute of Indiana as thus interpreted unconstitutional.[1] The State courts had previously maintained that the statute was constitutional as a valid exercise of the police power of the State;[2] but the Supreme Court of the United States held that this police power must be limited in its exercise so as not to conflict with the Federal constitution. So far, however, as such statutes are interpreted as regulating telegraph operations only within the State in which they are enacted, and applying only to defaults occurring in the State, they are constitutional and valid.[3]

§ 486. **Change in Penal Statutes.** — The legislatures in two Western States, about the year 1885, made an important change in the penal statutes relating to telegraph companies. Previous to that time a penalty was laid upon the company for negligence in the transmission and delivery of messages, this being in addition to the action for special damages caused by the injury. The hardship of the penal statute, imposing a penalty which might be and often was largely in excess of the damages caused by the negligence of the company, led the legislatures, in the year stated, to restrict the liability of the company for a fine or penalty to cases where the company actually refused to accept, transmit, or deliver the message. Following the policy of the legislature in this regard, the courts have refused to extend the meaning of the language of the statutes in such cases to include mere negligence, and have adhered strictly to the literal interpretation of the statutes, and require the plaintiff who seeks to recover

[1] Western Union Telegraph Co. *v.* Pendleton, 122 U. S. 347.

[2] Western Union Telegraph Co. *v.* Pendleton, 95 Ind. 12; Western Union Telegraph Co. *v.* Meredith, 95 Ind. 93.

[3] Connell *v.* Western Union Telegraph Co., 108 Mo. 459; Western Union Telegraph Co. *v.* Michelson, 21 S. E. Rep. 169; Western Union Telegraph Co. *v.* James, 90 Ga. 254, see *supra*, §§ 51, 416, 417.

the penalty to give evidence showing the refusal, and not mere negligence.[1]

In Indiana another important change was made in the penal statute, whereby the penalty was discontinued as to mere negligence, and retained only in cases of bad faith, partiality, and discrimination on the part of the company.[2] Since this statute requires discrimination on the part of the telegraph company in order to make it liable, the penalty is not incurred by merely receiving inadvertently a message directed to a place not on the company's line, and failing to send it, the operator being new and not well acquainted with the various stations of the company.[3]

§ 487. **Effect of Repeal on Right of Action.** — The effect of the enactment of these later statutes upon the former ones relating to the transmission of telegrams was considered in a case in Indiana.[4]

In this case the question discussed was whether the repeal of the earlier statute by the later one deprived a plaintiff, whose right of action had already accrued before the repeal, of a right to sue. The court held, first, that a forfeiture of penalty under a penal statute is not a personal cause of action, and that the repeal of the statute before the person has actually obtained judgment deprives him of the right to sue; and further held, in accordance with the decision in Steele's case,[5] that the later act repealed the earlier one; but sustained the action of the plaintiff by the help of a statute of that State, which expressly enacted that in cases where a

[1] Little Rock & Fort Smith Telegraph Co. *v.* Davis, 41 Ark. 79, old statute; Frauenthal *v.* Western Union Telegraph Co., 50 Ark. 78, new statute; Hadley *v.* Western Union Telegraph Co., 115 Ind. 191.

[2] Western Union Telegraph Co. *v.* Steele, 108 Ind. 163; Western Union Telegraph Co. *v.* Swain, 109 Ind. 405; Western Union Telegraph Co. *v.* Jones, 116 Ind. 361.

[3] Peterson *v.* Western Union Telegraph Co., 37 N. E. Rep. 810.

[4] Western Union Telegraph Co. *v.* Brown, 108 Ind. 538.

[5] Western Union Telegraph Co. *v.* Steele, 108 Ind. 163.

penalty had already been incurred by any person or company, the repeal of the statute giving the penalty should not affect the right of the person who was found entitled to the penalty, and he might sue for it and recover it as if the statute creating it were still in force.

§ 488. **Averments necessary in Action.** — Several points of pleading and practice have been decided as to these statutes, which are as follows: In an action for the statutory penalty for failure to transmit a despatch, the complaint is sufficient if it states the main facts upon which the right of recovery is founded so as to bring the case within the language and spirit of the statute.[1] But the complaint is construed strictly, and it is held that it must allege that the telegraph company is engaged in the business of telegraphing for the public for hire, and the court will not construe the charter of the company to supply this defect. An allegation that the company is engaged in the business of transmitting telegraphic messages for hire is not sufficient.[2] The complaint must at least refer to the statute on which the action is based.[3] Exculpatory matter forming part of the gist of the action must be denied in the complaint,[4] but exceptions and provisions shielding the telegraph company must be pleaded by it.[5] The message need not be set out in full, since the action is for a default in duty and not on the message as a contract.[6] If the plaintiff alleges that the telegram was delivered for

[1] Western Union Telegraph Co. *v.* Huff, 102 Ind. 535; Greenberg *v.* Western Union Telegraph Co., 89 Ga. 754.

[2] Western Union Telegraph Co. *v.* Axtell, 69 Ind. 199; but cf. Western Union Telegraph Co. *v.* Adams, 87 Ind. 598; Western Union Telegraph Co. *v.* Roberts, 87 Ind. 377.

[3] Kirby *v.* Western Union Telegraph Co., 57 N. W. Rep. 202, 60 N.W. Rep. 152.

[4] Burnett *v.* Western Union Telegraph Co., 39 Mo. App. 599; Western Union Telegraph Co. *v.* Gougar, 84 Ind. 176. Cf. Western Union Telegraph Co. *v.* Griffin, 1 Ind. App. 46.

[5] Western Union Telegraph Co. *v.* Gougar, 84 Ind. 176.

[6] Western Union Telegraph Co. *v.* Meredith, 95 Ind. 93.

sending on a certain day in one month, and the proof is that it was delivered on a certain day in another month, this variance is not necessarily fatal, as the time is only important as identifying the despatch, and if it is sufficiently identified otherwise, the variation of time becomes unimportant.[1]

§ 489. **Defence by Company.** — In an action on a statute for the penalty for the negligent transmission of a telegraphic message, the defendant company, if it wishes to take advantage of any rules or contract stipulations or statutory exceptions exempting it from the penalty, must allege and prove this exemption as a matter of affirmative defence. It cannot be given in evidence under a general denial, but must be set up by affirmative plea.[2] If the penalty is for failure to transmit and deliver, the company cannot defend upon a rule restricting free delivery to a certain limit if it has not transmitted the telegram, for the penalty in such a case is incurred by the failure to transmit, and the failure to deliver is immaterial.[3] But if the action is based on failure to deliver, the rule as to free delivery may be a good defence.[4]

§ 490. **Jurisdiction of Action.** — As the action for a penalty is not an action of contract, it cannot be brought in any court where jurisdiction is limited to actions of contract.[5] In Indiana, where the action is held to be based directly on the contract of transmission, this might be decided otherwise.[6] Nor is jurisdiction in actions of injury to personal property sufficient,[7] nor replevin.[8]

[1] Western Union Telegraph Co. *v.* Kilpatrick, 97 Ind. 42.

[2] Western Union Telegraph Co. *v.* Scircle, 103 Ind. 227; Western Union Telegraph Co. *v.* Gougar, 84 Ind. 176.

[3] Horn *v.* Western Union Telegraph Co., 88 Ga. 538.

[4] Moore *v.* Western Union Telegraph Co., 87 Ga. 613.

[5] Western Union Telegraph Co. *v.* Taylor, 84 Ga. 408; Baltimore, etc. Telegraph Co. *v.* Lovejoy, 48 Ark. 301.

[6] *Supra*, § 484.

[7] Cases *supra*, note 5.

[8] Baltimore, etc. Telegraph Co. *v.* Lovejoy, *supra*.

CHAPTER XXV.

SPECIAL CONTRACTS FOR TRANSMISSION OF TELEGRAMS.

§ 491. Special Contracts.
492. Analogy of Bills of Lading.
493. Regulations or Contracts.
494. Considered as Regulations.
495. Stipulations considered as Regulations of Business.
496. Message not on Company's Blank.
497. Assent presumed, when.
498. Considered as Part of Contract.
499. Stipulations as affecting the Addressee.
§ 500. Opinion in Aiken *v.* Western Union Telegraph Company.
501. Same Subject (*continued*).
502. Same Subject (*continued*).
503. Same Subject (*continued*).
504. Regulations as affecting Actions of Tort by the Addressee.
505. Opinion in Ellis *v.* American Telegraph Company.
506. Liability depends on Notice.
507. Exceptions to the Rule.
508. Classification of Special Agreements.

§ 491. **Special Contracts.** — The rights, duties, and liabilities conferred and imposed by law on telegraph companies in regard to the conduct of their business, in the absence of special contracts between the telegraph company and its customers, have been considered in the preceding chapters. Consideration will now be had of the various special agreements which are employed by the telegraph companies with a view to limiting their common-law liabilities in regard to the transmission of telegrams. Telegraph companies have in most cases prepared printed blank forms upon which the messages are to be written by the sender for transmission, and upon which the telegraph operator at the other end of the line copies the message for delivery to the addressee. These blank forms, of which specimens are given on the next page, contain various conditions and stipulations in regard to the liability of the company in the sending of the message, these conditions and stipulations being intended by the telegraph company to avoid or limit some of the liabilities cast upon

it by the law.[1] The following sections will be mainly directed to the effect of these conditions and stipulations.

[1] [Form No. 2.]

THE WESTERN UNION TELEGRAPH COMPANY.

INCORPORATED.

21,000 Offices in America. Cable Service to all the World.

Thos. T. Eckert, President and General Manager.

Receiver's No.	Time Filed.	Check.

Send the following message subject to the terms on the back hereof, which are hereby agreed to.

.....189

To .....

.....

READ THE NOTICE AND AGREEMENT ON BACK.

All Messages taken by this Company are Subject to the Following Terms:—

To guard against mistakes or delays, the sender of a message should order it REPEATED; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this Company, that said Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery of any UNREPEATED message, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery of any REPEATED message, beyond fifty times the sum received for sending the same, unless specially insured, nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this Company is hereby made the agent of the sender, without liability, to forward over the lines of any other Company when necessary to reach its destination.

Correctness in the transmission of a message to any point on the lines of this Company can be INSURED by contract in writing, stating agreed amount of risk, and payment of premium thereon, at the following rates, in addition to the usual charge for repeated messages, viz., one per cent. for any distance not exceeding 1,000 miles, and two per cent. for any greater distance. No employee of the Company is authorized to vary the foregoing.

No responsibility regarding messages attaches to this Company until

§ 492. **Analogy of Bills of Lading.** — The use of these printed forms containing such conditions and stipulations is analogous to the use of bills of lading and similar printed docu-

the same are presented and accepted at one of its transmitting offices; and if a message is sent to such office by one of the Company's messengers, he acts for that purpose as the agent of the sender.

Messages will be delivered free within the established free delivery limits of the terminal office. For delivery at a greater distance, a special charge will be made to cover the cost of such delivery.

The Company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the Company for transmission.

THOS. T. ECKERT, President and General Manager.

[Form No. 45.]

NIGHT MESSAGE.

THE WESTERN UNION TELEGRAPH COMPANY.

INCORPORATED.

21,000 OFFICES IN AMERICA. CABLE SERVICE TO ALL THE WORLD.

THOS. T. ECKERT, President and General Manager.

Receiver's No.	Time Filed.	Check.

SEND the following night message subject to the terms on back hereof, which are hereby agreed to.

.....189

To.....

.....

READ THE NOTICE AND AGREEMENT ON BACK.

NIGHT MESSAGE.

ALL NIGHT MESSAGES TAKEN BY THIS COMPANY ARE SUBJECT TO THE FOLLOWING TERMS: —

The Western Union Telegraph Company will receive messages, to be sent during the night, for delivery not earlier than the morning of the next ensuing business day, at reduced rates, but in no case less than twenty-five cents tolls for a single message.

To guard against mistakes or delays, the sender of a message should order it REPEATED; that is, telegraphed back to the originating office

ments by common carriers, whereby they bring to the notice of parties consigning goods to their care, the limitations to their common-law liability as insurers, which they wish to avail themselves of. As has been previously seen,[1] the law is well settled that telegraph companies are not liable as insurers as common carriers are. The question then arises, what effect these printed stipulations and conditions may have in the case of telegraph companies.

§ 493. **Regulations or Contracts.** — The first point for consideration is whether these conditions and stipulations on

for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company, that said Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery of any UNREPEATED message, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery of any REPEATED message beyond ten times the sum received for sending the same, unless specially insured, nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this Company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other Company when necessary to reach its destination.

Correctness in the transmission of a message to any point on the lines of this company can be INSURED by contract in writing, stating agreed amount of risk, and payment of premium thereon, at the following rates, in addition to the usual charge for repeated messages, viz., one per cent. for any distance not exceeding 1,000 miles, and two per cent. for any greater distance. No employee of the Company is authorized to vary the foregoing.

No responsibility regarding messages attaches to this Company until the same are presented and accepted at one of its transmitting offices; and if a message is sent to such office by one of the Company's messengers, he acts for that purpose as the agent of the sender.

Messages will be delivered free within the established free delivery limits of the terminal office. For delivery at a greater distance, a special charge will be made to cover the cost of such delivery.

The Company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within thirty days after the message is filed with the Company for transmission.

Thos. T. Eckert, President and General Manager.

[1] *Supra*, §§ 377–379.

the printed blank forms are to be considered as forming a contract between the sender of the message and the telegraph company, or whether they are to be considered as regulations of the telegraph business merely. The theoretical difference between these stipulations considered as regulations of the business or as agreements of the parties is obvious, for if they are considered merely as regulations, the assent of the sender to them is not necessary, for they will bind him if brought home to his knowledge,[1] whereas if they are held to be portions of a contract, the assent of the sender must be shown in order to bind him.[2]

§ 494. **Considered as Regulations.** — In some States the courts have held that these stipulations and conditions may be considered as rules and regulations of the business by the telegraph company, but cannot be considered as a contract. Thus in Bartlett *v.* Western Union Telegraph Company,[3] the court, speaking of such a printed blank form, says, "But it is difficult to see on what ground it can be called a contract. While we concede that the forms of one have an existence, the substance is wanting. The parties are not in a condition to contract on equal terms. The company holds itself out to the public as in readiness to transmit all such despatches as may be presented for that purpose. The telegraph has created a necessity for its use. Business can be transacted without it only at a very great disadvantage. In most places there is no choice as to lines, and where there is, it is so limited that a virtual monopoly exists. On the other hand, the occasion for sending a message often comes suddenly, or with so short notice as to leave no time for deliberation, or to examine and consider the terms offered. Under such circumstances, the sender seldom if ever reads what is printed on the blank, or gives any intelligent assent thereto."

[1] *Post*, § 495.
[2] *Post*, § 498.
[3] 62 Me. 209, 218.

§ 495. **Stipulations considered as Regulations of Business.** — Considered as rules and regulations of the telegraph business, it is generally held that such rules and regulations established by telegraph companies for the conduct of their business, if reasonable, bind parties sending messages, if brought home to their knowledge, the assent of the sender being unessential, and that printing such rules and regulations upon the blank forms of the telegraph companies brings the rules and regulations to the knowledge of the person sending a message written upon such forms.[1] It will be seen later that the courts have held all the usual stipulations in telegraph blanks to be reasonable, except those which attempt to exempt the company from the consequences of negligence in the transmission and delivery of messages, and that as to this latter class of regulations there is a division of opinion in the courts of the various States.[2]

§ 496. **Message not on Company's Blank.** — If the message is not written on one of the company's blanks the decisions are not uniform as to whether extrinsic knowledge of the rules and regulations of the company by the sender of the message will bind him. On one hand, it has been held that in such a case there must be some evidence of his having assented to the regulations,[3] while on the other, it has been held either that his assent is presumed, or that it is not necessary, since the regulations, being reasonable, will bind

[1] Bartlett *v.* Western Union Telegraph Co., 62 Me. 209, 213; Wolf *v.* Western Union Telegraph Co., 62 Pa. St. 83; Kiley *v.* Western Union Telegraph Co., 109 N. Y. 231 (but in this State mere notice is not enough unless shown to be brought to the personal knowledge of the party and assented to by him, and the matter is now regarded as one of contract in this State. Pearsall *v.* Western Union Telegraph Co., 124 N. Y. 256); Ellis *v.* American Telegraph Co., 13 Allen, 226; Birney *v.* New York & Washington Printing Telegraph Co., 18 Md. 341; Wann *v.* Western Union Telegraph Co., 37 Mo. 472; De Rutte *v.* New York, Albany & Buffalo, etc. Telegraph Co., 1 Daly, 547.

[2] *Post*, § 508.

[3] Pearsall *v.* Western Union Telegraph Co., 124 N. Y. 256.

those who have knowledge of them and deal with the company.[1]

§ 497. **Assent presumed, when.** — Whether it be considered that the assent of the sender of the message to the rules or regulations is necessary or not, it is conclusively presumed in cases where he writes the message upon a telegraph blank and signs it.[2]

§ 498. **Considered as Part of Contract.** — Considering the conditions and stipulations printed on telegraph blanks not as rules and regulations of the business, but as forming a part of a special contract with the sender of the message, the rule is that the sender of the message, by writing it upon the printed blank, assents to the special agreements contained therein, and is bound by them, so far as they are held reasonable by the courts.[3]

§ 499. **Stipulations as affecting the Addressee.** — How far these stipulations and conditions, if valid, affect the person to whom the message is addressed is a matter upon which the decisions are not uniform. It has already been seen,[4] that in many cases such person is in fact the principal, and the sender is his agent for the sending of the message, even where no express agency exists, if the message is for the benefit and concerning the business of the person to whom the message is sent. In such cases the stipulations,

[1] Clement *v.* Western Union Telegraph Co., 137 Mass. 463.

[2] Redpath *v.* Western Union Telegraph Co., 112 Mass. 71; Beasley *v.* Western Union Telegraph Co., 39 Fed. Rep. 181; Breese *v.* United States Telegraph Co., 48 N. Y. 132; Cole *v.* Western Union Telegraph Co., 33 Minn. 227; Womack *v.* Western Union Telegraph Co., 58 Tex. 179; Western Union Telegraph Co. *v.* Carew, 15 Mich. 536.

[3] True *v.* International Telegraph Co., 60 Me. 9; Western Union Telegraph Co. *v.* Carew, 15 Mich. 525; Kiley *v.* Western Union Telegraph Co., 109 N. Y. 231; Ellis *v.* American Telegraph Co., 13 Allen, 226; Redpath *v.* Western Union Telegraph Co., 112 Mass. 71; Beasley *v.* Western Union Telegraph Co., 39 Fed. Rep. 181; Breese *v.* United States Telegraph Co., 48 N. Y. 132; Cole *v.* Western Union Telegraph Co., 33 Minn. 227; Womack *v.* Western Union Telegraph Co., 58 Tex. 179.

[4] *Supra*, §§ 455–457.

whether considered as regulations or as part of the contract, would, if reasonable and valid, apply as well to the addressee of the message as to the sender, since the latter is but the agent of the former in the sending of the message, and the knowledge of the agent is the knowledge of the principal, and the contract of the agent binds the principal.[1] This point was discussed in a case in South Carolina, in which the court took the view that the receiver of a message which is sent for his benefit, and concerning his business, is in reality the principal, and the sender is but his agent, and therefore the principal is bound by the stipulations known to and assented to by the agent.

§ 500. **Opinion in Aiken v. Western Union Telegraph Company.** — "The plaintiff is a privy to the contract under which the service was performed, and has a right to demand due performance. The contract in question is one of a peculiar class, as affecting questions of liability and privity arising under it. It is a contract with one exercising a public employment under express statute powers created for that purpose. The nature of the occupation of that class of persons, and the tender of their services to the community, makes them common agents for the transmission of messages for all persons who may desire and pay for such service, to any person, either as the final receiver of such message or as a means or agent for its further transmission. The object of the contract is to modify and limit the contract which, by operation of law, would arise between the common carrier of messages and any person employing such carrier, in the absence of any stipulation of terms between them. The

[1] Breese *v.* United States Telegraph Co., 48 N. Y. 132; Beasley *v.* Western Union Telegraph Co., 39 Fed. Rep. 181; Aiken *v.* Western Union Telegraph Co., 5 S. C. 358; Western Union Telegraph Co. *v.* James, 90 Ga. 254; Aiken *v.* Western Union Telegraph Co., 69 Ia. 31; Massengale *v.* Western Union Telegraph Co., 17 Mo. App. 257; De La Grange *v.* Southwestern Telegraph Co., 25 La. An. 383. Compare *post*, §§ 555–557, and *ante*, §§ 455–457.

foundation of the contract is the nature of the carrier's occupation and the fact of employment. The legal consequences flowing from such employment are what the special contract seeks to modify or limit. Every such contract implies a sender of a message, a receiver, and an agent of transmission. The nature of the contract is, in this respect, the same, whether the rights and duties of the respective parties are defined by operation of law or by express stipulations between themselves. It would, therefore, follow that the question whether the receiver of the message is a privy should receive the same solution, whether the contract is the result of the operation of law or of special terms of agreement between the parties.

§ 501. **Same Subject** (*continued*). — "The simplest form then, in which the question of the privity of the plaintiff can be examined, is upon the assumption that a third person had delivered a message to the defendants for transmission to the plaintiff, in the delivery of which the plaintiff had a pecuniary interest, and without the stipulation of any terms of transmission. In the case supposed, would not the receiver, accepting such service, be bound to pay for it, and be entitled to demand due performance on the part of the carrier? Clearly he would.

§ 502. **Same Subject** (*continued*). — "The fact that the receiver had not directly conferred with the carrier as to the duty to be performed would be unimportant. The carrier who undertakes to carry for all dispenses with the necessity of knowing and dealing directly or personally with his employer. His offers of services are intended to meet the requirements of all cases where a message, in ordinary course, is to be transmitted. Such cases embrace those in which the message is transmitted for the benefit of the sender, those in which it is for the benefit of the receiver, and those in which it is for the mutual benefit of both sender and receiver. Construing his contract by the nature of the

service to be performed, it is clear that the party for whose benefit the service is to be performed is to be regarded as considered and included in the obligations resulting from the fact of employment, whether that person stands to it in the relation of sender or receiver. If such is the conclusion where the compensation for the service is not paid until the service is performed, it cannot be altered by the fact that the service is paid for in advance, nor by the consideration as to which one of the parties included paid it. The time when a consideration is paid, and the person by whom paid are not essential elements of the question, the parties to the obligation being clearly known by the objects intended by the contract.

§ 503. **Same Subject** (*continued*). — "It is equally clear that any stipulation of an express nature, intended to mould and limit the obligation, must be considered as attaching to the obligation in its fullest extent, and affecting equally all the persons related to it, either as sender, receiver, or agent of transmission. Under this view of the contract the plaintiff is entitled to enforce its provisions as a direct party in interest."[1]

§ 504. **Regulations as affecting Actions of Tort by the Addressee.** — In actions by the person to whom the message is addressed where the action is simply an action of tort, the question whether the plaintiff can be held bound by the stipulations and conditions in the printed forms of blanks is one of considerable difficulty. In some States the courts have held that if there is no privity of contract between the telegraph company and the person to whom the message is addressed, he cannot be held bound by these stipulations, since they form a portion of the contract with the sender of the message, and this contract cannot affect the person to whom the message is sent;[2] while in other States it is

[1] Aiken *v.* Western Union Telegraph Co., 5 S. C. 358.

[2] New York & Washington Printing Telegraph Co. *v.* Dryburg, 35 Pa. St. 298; Harris *v.* Western Union Telegraph Co., 9 Phila. 88; Western

held that the person to whom the message is addressed cannot have any greater rights in an action of tort against the telegraph company than the sender of the message could have in an action on his contract, and if the regulations are reasonable ones for the conduct of the business, they bind parties having notice of them dealing with the company as receivers of messages, as well as parties dealing with it as senders of messages.[1]

§ 505. **Opinion in Ellis v. American Telegraph Company.** — In the Massachusetts case cited in the preceding section, the action was brought in tort against the telegraph company to recover damages resulting from an error in the transmission of a message from Boston to the plaintiff in New Bedford. The message as delivered to the telegraph company for transmission was written upon the usual printed form, and was presumably delivered to the plaintiff on a similar form. The court, after discussing the obligations of the telegraph company as to the transmission of messages, and maintaining that the company might limit its liability for negligence by express stipulations in the contract with the sender of the message, says, "The defendant company was entitled to insist on the compliance with that part of their regulations which require that the message should be repeated, and that the extent of the risk should be made known to them if they were to be held to insure the safe and correct transmission of the message, or, in case of failure, to be responsible for all the damages consequent on delays or errors. Of this regulation the plaintiff had notice. Although he entered into no express contract with the defendants, and cannot be held to have made any special stipulations with them by

Union Telegraph Co. *v.* Fenton, 52 Ind. 1; Western Union Telegraph Co. *v.* Longwill, 21 Pa. Rep. 339; Western Union Telegraph Co. *v.* Richman, 19 Week. No. of Cas. 569; Bell *v.* Dom. Telegraph Co., 3 Leg. News, 405; Watson v. Mont. Telegraph Co., 5 Leg. News, 87.

[1] Ellis *v.* American Telegraph Co., 13 Allen, 226; Findlay *v.* Western Union Telegraph Co., 64 Fed. Rep. 459. Compare *post*, §§ 555–557.

which he is bound, he did consent to receive at their hands a message which he alleges it was their duty to deliver to him. It is for this undertaking by the defendants, and for the breach of duty of which he alleges they are guilty, that he seeks to hold them in this action. It may therefore be a sufficient answer to such a claim, that according to the reasonable regulations by which they were governed in the performance of their undertaking towards the plaintiff, and of which he had notice, they have committed no breach of duty for which they can be held liable to him." The court then in addition supports the case upon another ground, *i. e.*, that the plaintiff claiming through the contract of the sender could have no higher rights than the sender could, and distinguishes the case of New York & Washington Printing Telegraph Company *v.* Dryburg[1] by the fact that in the latter case there was no proof that the receiver of the message had any notice or knowledge of the regulation of the company by which their liability was restricted.

§ 506. **Liability depends on Notice.** — The result of the foregoing decisions would seem to indicate that the true rule in actions of tort by the addressee of a message is that if the addressee of the message has notice or knowledge of the regulation of the telegraph company in question, as embodied in the blank printed forms, the regulation will bind him in dealing with the company if it is such a regulation as the courts consider reasonable, in application to the addressee of the message;[2] while if the addressee had no notice or knowledge of the regulation, even though it is valid as against the sender, the right of the addressee of a message to sue in tort for error or delay in the delivery will not be limited by the stipulations of the company contained in its printed forms.[3]

[1] 35 Pa. St. 298.

[2] Compare *post*, § 556.

[3] Western Union Telegraph Co. *v.* Culberson, 79 Tex. 66; New York & Washington Printing Telegraph Co. *v.* Dryburg, 35 Pa. St. 298, 303;

§ 507. **Exceptions to the Rule.** — If the message is not delivered to the addressee upon a printed form of the company containing the regulation in question the addressee is not affected with notice thereof, unless it is shown by extrinsic evidence that he knew of the regulation.[1] Furthermore the exceptions to the rule allowing telegraph companies to exempt themselves from liability for negligence by special stipulation, which are discussed hereafter,[2] namely, that the exemption will not cover cases of total failure to transmit the message or delay in the delivery, or other instances of negligence which would not be prevented by repetition, will apply also to suits brought by the addressee of the message, and in such case the exemption clause will not protect the telegraph company, even in States where it is held otherwise to apply to the addressee as well as to the sender of the message.[3] The discussion of the analogous question of how far the addressee of a message is bound by regulations limiting the time within which claims for damages against the company must be presented to it, will throw some light upon this matter.[4]

§ 508. **Classification of Special Agreements.** — The general subject of the validity of special agreements between the telegraph company and those dealing with it, having been considered, it now remains to discuss the various special agreements which have been embodied by the telegraph companies in their printed blank forms. These may be divided into eight subjects. First, stipulations exempting

Ellis *v.* American Telegraph Co., 13 Allen, 226, 237; Western Union Telegraph Co. *v.* Fenton, 52 Ind. 1; Herron *v.* Western Union Telegraph Co., 57 N. W. Rep. 696; Findlay *v.* Western Union Telegraph Co., 64 Fed. Rep. 459; Western Union Telegraph Co. *v.* Hinkle, 3 Tex. Civ. App. 518; Thurston *v.* Western Union Telegraph Co., 33 Fed. Rep. 362.

[1] Western Union Telegraph Co. *v.* Hinkle, 3 Tex. Civ. App. 518.

[2] *Post*, §§ 525–527.

[3] Thurston *v.* Western Union Telegraph Co., 33 Fed. Rep. 362.

[4] See *post*, §§ 555–557.

the company from liability for negligence. These stipulations are discussed at length in Chapter XXVI. Second, exemption of the company from liability for damages caused by unavoidable interruption of the working of its lines. This subject has been already considered,[1] in connection with the kinds of negligence for which the company is liable, and it is sufficient here to say that in most States the telegraph company is not held liable for such damages even in the absence of an express stipulation to that effect. Third, an exemption from liability for errors in cipher or obscure messages. This subject is discussed fully in the chapter on the Measure of Damages.[2] Fourth, the liability for errors or negligence when the message is forwarded over connecting lines. This subject has been already discussed in Chapter XXII. Fifth, an agreement as to the insurance of the safe transmission of the message. This subject is discussed in Chapter XXVI., in connection with the stipulations exempting the company from liability for negligence, of which subject it forms a part. Sixth, the presentation of messages to the company for transmission. This subject has been discussed in a previous chapter,[3] on the subject of the duty of the company to accept messages for transmission. Seventh, a stipulation as to the free delivery of the message within certain limits. This matter has been already discussed,[4] in connection with the duty of the telegraph company as to delivery of the message. Eighth, a stipulation that claims for damages must be presented to the company within a certain limited time. This subject is discussed at length in a succeeding chapter.[5]

[1] §§ 400–402.
[2] *Post*, §§ 588–604.
[3] Ch. xvi.
[4] §§ 416–417.
[5] Ch. xxvii.

CHAPTER XXVI.

EXEMPTION OF TELEGRAPH COMPANY FROM LIABILITY FOR NEGLIGENCE BY SPECIAL AGREEMENT.

§ 509. Exemption from Negligence.
510. Exemption from Gross Negligence.
511. Exemption from Ordinary Negligence.
512. American Cases sustaining Exemption.
513. American Cases disapproving Exemption.
514. Effect of Statutes on above Decisions.
515. Exemption from Damages from Atmospheric Causes.
516. Forms of Special Agreement.
517. Day Message Exemption. Repetition required, English Rule.
518. American Cases sustaining Repeating Clause.
519. Kentucky Case.
520. Maryland Case.
521. Missouri Case.
522. Massachusetts Case.
523. Michigan Case.
524. Pennsylvania Case.
§ 525. Delay in Transmission or Delivery not covered by Exemption.
526. Sending Message to Wrong Destination.
527. Total Failure to Transmit.
528. Failure to Transmit on account of State of Line.
529. Waiver of Exemption Clause.
530. American Cases holding Exemption invalid.
531. Opinion to this Effect.
532. Smith *v.* Western Union Telegraph Company.
533. Gillis *v.* Western Union Telegraph Company.
534. Same (*continued*).
535. Night Messages. Exemption not sustained in some States.
536. Exemption maintained in some States.
537. Whether applicable to Receiver of Message.

§ 509. **Exemption from Negligence.** — One of the most important stipulations which telegraph companies employ in the conduct of their business for the purpose of limiting their liability at law is a stipulation whereby the company is exempted from damages caused by the negligence of the company or its operators or servants in the transmission and delivery of telegrams. The special forms in which this stipulation has been embodied in the printed blanks of the telegraph companies will be given later and discussed separately, but first a general discussion will be had of whether or not such a stipulation in any form is legal.

§ 510. **Exemption from Gross Negligence.** — Whatever difference of opinion may exist, as will be shown later in this chapter,[1] as to the legality of a telegraph company exempting itself from liability for ordinary negligence of its servants and operators, it has been held from the earliest cases, with but one or two exceptions, that a telegraph company cannot, by any contract, agreement, rule, regulation, or other device, exempt itself from the consequences of gross negligence on the part of the company or its operators or servants, and that any attempt so to do will be overruled by the courts as being against public policy.[2] The meaning of the term "gross negligence," and its application to such cases, has been considered fully in previous sections,[3] and, as was there shown, it is difficult to assign any precise meaning to the phrase "gross negligence," and there is a tendency to disapprove of this distinction as applied to telegraph companies, but it must be considered as well-settled law at the present time.

§ 511. **Exemption from Ordinary Negligence.** — As to the question whether a telegraph company may by special contract or regulations of its business exempt itself from the

[1] *Post*, §§ 518–536.

[2] Lassiter *v.* Western Union Telegraph Co., 89 N. C. 334; Thompson *v.* Western Union Telegraph Co., 107 N. C. 449; Clement *v.* Western Union Telegraph Co., 137 Mass. 463; Redpath *v.* Western Union Telegraph Co., 112 Mass. 71; Grinnell *v.* Western Union Telegraph Co., 113 Mass. 299; Ellis *v.* American Telegraph Co., 13 Allen, 226; Western Union Telegraph Co. *v.* Buchanan, 35 Ind. 429, 441; Birkett *v.* Western Union Telegraph Co., 61 N. W. Rep. 645; Tyler *v.* Western Union Telegraph Co., 60 Ill. 421; Western Union Telegraph Co. *v.* Crall, 38 Kan. 679; United States Telegraph Co. *v.* Gildersleve, 29 Md. 232; Candee *v.* Western Union Telegraph Co., 34 Wis. 471; Western Union Telegraph Co. *v.* Fontaine, 58 Ga. 433; Pegram *v.* Western Union Telegraph Co., 100 N. C. 28; Schwartz *v.* Atlantic & Pacific Telegraph Co., 18 Hun, 157; Western Union Telegraph Co. *v.* Neill, 57 Tex. 283; Jones *v.* Western Union Telegraph Co., 18 Fed. Rep. 717; Gillis *v.* Western Union Telegraph Co., 61 Vt. 461.

[3] *Supra*, §§ 385–395.

consequences of ordinary as distinguished from gross negligence on the part of the company, its operators or servants, in the transmission and delivery of messages, there is a decided difference of opinion in the various States. Some courts hold that a stipulation, regulation, or special agreement assented to by the party dealing with the company, and in its nature reasonable, may be employed by the telegraph company to exempt itself from such liability.[1] This rule was adopted in England in the first case which brought up this point,[2] the reasoning of the courts being that the company might lawfully limit its liability for any negligence except gross negligence by a special notice, provided the condition or stipulation or regulation of which notice was given was a reasonable one; and further, that a regulation exempting the company from liability for negligence in the transmission or delivery of a message unless the same was repeated, for which repetition a further charge was made, was a reasonable one considering the nature of the occupation of telegraphing, for it gave the public the opportunity of transmitting unimportant messages for a small charge, or if it be a matter of importance, the sender might, at a moderate additional charge, have the message repeated, and so obtain a certainty almost of its being transmitted with perfect accuracy.

§ 512. **American Cases sustaining Exemption.** — In many of the United States the reasoning and rule of the English courts have been adopted, and the courts have established the rule that if the stipulation exempting the company from liability for negligence in transmitting and delivering messages is reasonable, it will be sustained either as part of the contract of the company or as a reasonable regulation of the business of telegraphy.[3] The two principal forms of stipula-

[1] See cases, *post*, § 512, note 3.

[2] MacAndrew *v.* Electric Telegraph Co., 17 C. B. 3.

[3] Ellis *v.* American Telegraph Co., 13 Allen, 226; Grinnell *v.* Western Union Telegraph Co., 113 Mass. 229; Redpath *v.* Western Union Tele-

tions of this kind are that contained in the ordinary day blank, and that contained in what is called the "half rate" message blank or the "night message" blank, both of which are considered in later sections.[1]

§ 513. **American Cases disapproving Exemption.** — In others of the United States the courts have taken the broad ground that any stipulation or regulation, or other device, whereby a telegraph company seeks to exempt itself from liability for damages caused by the ordinary negligence of the company, its operators or servants, in the transmission and delivery of messages, is against public policy and void, at least as to such negligence, though if its language is broad enough, it may apply to other causes of liability, such as damages caused by atmospheric causes and similar causes.[2] The

graph Co., 112 Mass. 71; Clement *v.* Western Union Telegraph Co., 137 Mass. 463; Aiken *v.* Western Union Telegraph Co., 5 S. C. 358; Passmore *v.* Western Union Telegraph Co., 78 Pa. St. 242; Schwartz *v.* Atlantic & Pacific Telegraph Co., 18 Hun, 157; Kiley *v.* Western Union Telegraph Co., 109 N. Y. 231; Pearsall *v.* Western Union Telegraph Co., 124 N. Y. 267; United States Telegraph Co. *v.* Gildersleve, 29 Md. 232; Becker *v.* Western Union Telegraph Co., 11 Neb. 87; (now changed by statute, Kemp *v.* Western Union Telegraph Co., 28 Neb. 661; Western Union Telegraph Co. *v.* Lowrey, 32 Neb. 732); Birkett *v.* Western Union Telegraph Co., 61 N. W. Rep. 645; Western Union Telegraph Co. *v.* Neill, 57 Tex. 283; Womack *v.* Western Union Telegraph Co., 58 Tex. 176; Western Union Telegraph Co. *v.* Hearne, 77 Tex. 83; Jones *v.* Western Union Telegraph Co., 18 Fed. Rep. 717, Ark. (but see *contra*, Western Union Telegraph Co. *v.* Short, 53 Ark. 439); Hart *v.* Western Union Telegraph Co., 66 Cal. 579 (but see Western Union Telegraph Co. *v.* Cook, 61 Fed. Rep. 624); Wann *v.* Western Union Telegraph Co., 37 Mo. 472; Western Union Telegraph Co. *v.* Carew, 15 Mich. 525; Lassiter *v.* Western Union Telegraph Co., 89 N. C. 334 (but now overruled by Brown *v.* Postal Telegraph Cable Co., 111 N. C. 187).

[1] *Post*, § 517 and § 535.

[2] *Post*, § 515; American Union Telegraph Co. *v.* Daughtery, 89 Ala. 191; Daughtery *v.* American Union Telegraph Co., 75 Ala. 168; Gillis *v.* Western Union Telegraph Co., 61 Vt. 461; Smith *v.* Western Union Telegraph Co., 83 Ky. 104; Camp *v.* Western Union Telegraph Co., 1 Metc. (Ky.) 164; Western Union Telegraph Co. *v.* Short, 53 Ark. 439; Marr *v.* Western Union Telegraph Co., 85 Tenn. 538; Brown *v.* Postal Telegraph

courts which hold this view base it upon the great importance to the public of having messages safely transmitted, and the consequent necessity of holding telegraph companies to a strict degree of diligence in the matter; and although in the case of individuals doing business together such a stipulation in a contract as would exempt the party transacting the business from liability for negligence might be reasonable and valid, yet the telegraph company has such an advantage in dealing with its customers from the fact that it has practically a monopoly of the business of speedy transmission of message, and because the interests of the customers will not permit them to do without these facilities, that any contract which may be entered into between the parties is subject to the inspection and revision of the court to determine its reasonableness, and that such stipulations as are placed upon the customer by the telegraph company, releasing it from its obligations to perform its legal duty, are unreasonable and against public policy.[1]

§ 514. **Effect of Statutes on above Decisions.** — While the above decisions are maintained by the courts generally upon grounds of public policy, and without special reference to

Cable Co., 111 N. C. 187; Thompson *v.* Western Union Telegraph Co., 107 N. C. 449; Western Union Telegraph Co. *v.* Reynolds, 77 Va. 185; Western Union Telegraph Co. *v.* Cook, 61 Fed. Rep. 624; Western Union Telegraph Co. *v.* Meredith, 95 Ind. 93; Western Union Telegraph Co. *v.* Young, 93 Ind. 118; Western Union Telegraph Co. *v.* Fenton, 52 Ind. 1; Western Union Telegraph Co. *v.* Blanchard, 68 Ga. 299; Western Union Telegraph Co. *v.* Shotter, 71 Ga. 760; Western Union Telegraph Co. *v.* Fontaine, 58 Ga. 433; Telegraph Co. *v.* Griswold, 37 Oh. St. 301; Ayer *v.* Western Union Telegraph Co., 79 Me. 493; Bartlett *v.* Western Union Telegraph Co., 62 Me. 209; Aiken *v.* Western Union Telegraph Co., 69 Ia. 31; Manville *v.* Western Union Telegraph Co., 37 Ia. 214; Hibbard *v.* Western Union Telegraph Co., 33 Wis. 558; Western Union Telegraph Co. *v.* Harris, 19 Ill. App. 347; Tyler *v.* Western Union Telegraph Co., 60 Ill. 421; Western Union Telegraph Co. *v.* Graham, 1 Col. 230; Abraham *v.* Western Union Telegraph Co., 23 Fed. Rep. 315; Wertz *v.* Western Union Telegraph Co. (Utah), 27 Pac. Rep. 172.

[1] See cases *supra*, note 2, page 452.

any statutory obligations of telegraph companies, yet these grounds are sometimes re-enforced by the fact that to permit the telegraph company to avoid its liability for negligence by contract would be to allow it to annul the force of statutes expressly casting this liability upon it. The question whether if the statute commands the performance of a certain duty, parties upon whom this duty is cast may avoid it by contract with those in whose favor the statute operates, is one upon which no general rule can be laid down, the question in each case being the general purpose and intent of the statute, and whether it is advisable as a matter of public policy to allow such exemption.[1] There have been several cases, however, in which the courts have held that where a statute provides that telegraph companies shall be responsible for their negligence in sending messages, no contract between the telegraph company and those dealing with it will be legal which annuls the force of the statute. This has been so held in Wisconsin,[2] where the statute makes telegraph companies responsible for their negligence in sending messages, though the case was decided on another point; in Nebraska, where a similar statute exists;[3] in California, where the statute requires telegraph companies to use "great care" in the transmission of messages;[4] and in Indiana.[5] In a few States the legislatures have expressly enacted that stipulations exempting telegraph companies from liability for their negligence shall be wholly or partially

[1] Compare *ante*, § 463.

[2] Cutts *v.* Western Union Telegraph Co., 71 Wisc. 46.

[3] Western Union Telegraph Co. *v.* Lowrey, 32 Neb. 732.

[4] Western Union Telegraph Co. *v.* Cook, 61 Fed. Rep. 624.

[5] Western Union Telegraph Co. *v.* Meredith, 95 Ind. 93; Western Union Telegraph Co. *v.* Young, 93 Ind. 118; Western Union Telegraph Co. *v.* Adams, 87 Ind. 598; Western Union Telegraph Co. *v.* Buchanan, 35 Ind. 429; Western Union Telegraph Co. *v.* Meek, 49 Ind. 53. *Semble*, *contra*, Sweatland *v.* Illinois & Mississippi Telegraph Co., 27 Iowa, 432. Cf. *Supra*, § 482, and *post*, § 548.

void. Such statutes exist in Massachusetts,[1] Minnesota,[2] and Nebraska.[3]

§ 515. **Exemption from Damages from Atmospheric Causes.** — In many cases where stipulations exempting telegraph companies from negligence have been discussed, the courts have said that while such stipulations are not valid so far as they attempt to exempt the company from liability for its own negligence, yet they are so far valid that they will protect the company from liability for damages caused by atmospheric or electrical causes, or acts of third parties, which the company could not have foreseen or provided against. The real meaning, however, of such statements is that the telegraph company is not liable at law for damages resulting from such causes, even in the absence of special contract stipulations, as was stated in preceding sections.[4]

§ 516. **Forms of Special Agreement.** — Having considered the general subject of whether or not any agreement exempting a telegraph company from liability for its own negligence, or that of its operators and servants, is valid, the next matter which comes for discussion is the validity of the two special clauses by means of which telegraph companies generally attempt to escape from their legal liability for negligence. Of course in States where the courts hold that any such attempt to evade this liability is against public policy and void, neither of these clauses has any validity.[5] In States, however, where a reasonable stipulation against liability for negligence is allowed by the courts as valid,[6]

[1] *Supra*, § 333. [2] *Supra*, § 335. [3] *Supra*, § 338.

[4] *Supra*, §§ 400–402; Manville *v.* Western Union Telegraph Co., 37 Ia. 214; Tyler *v.* Western Union Telegraph Co., 60 Ill. 421; Western Union Telegraph Co. *v.* Tyler, 74 Ill. 168; True *v.* International Telegraph Co., 60 Me. 9; Bartlett *v.* Western Union Telegraph Co., 62 Me. 209; Fowler *v.* Western Union Telegraph Co., 80 Me. 381; Sweatland *v.* Illinois & Mississippi Telegraph Co., 27 Ia. 433; Telegraph Co. *v.* Griswold, 37 Oh. St. 301; Western Union Telegraph Co. *v.* Cohen, 73 Ga. 522.

[5] *Supra*, § 513. [6] *Supra*, §§ 511, 512.

the question comes up whether the two clauses usually adopted by the telegraph company are reasonable. These two clauses are the exemption clause contained in the day message blank, and that contained in the night message blank.

§ 517. **Day Message Exemption. Repetition required, English Rule.** — The usual form in which the telegraph company seeks to limit its liability for negligence in the transmission and delivery of day messages is as follows: "To guard against mistakes or delays the sender of the message should order it repeated, that is, telegraphed back to the originating office for comparison. For this, one half the regular rate is charged in addition. It is agreed between the sender of the following message and the company, that said company shall not be liable for mistakes or delays in the transmission or delivery or for the non-delivery of any unrepeated message, beyond the amount received for sending the same, or for mistakes or delays in the transmission or delivery or for non-delivery of any repeated message, beyond fifty times the sum received for sending the same unless specially insured, nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages." The validity of this clause or similar ones has been considered in a great number of cases. The English courts in an early case [1] decided that such a stipulation is reasonable and valid, and will exempt the company from liability for the negligence of its servants and operators. In this case the plaintiff sent his telegram subject to a condition by which the company charged half the usual price in addition for repeating the message, and stated that they would not be responsible for mistakes in the transmission of unrepeated messages, from whatever cause they might arise. The English statutes required the company, subject to such reasonable regulations as might be from time to time made

[1] MacAndrew *v.* Electric Telegraph Co., 17 C. B. 3.

or entered into by the company, to send and receive messages for all persons alike, without favor or preference. It was held that the regulation was reasonable so far as it required a message to be repeated, and provided that the company would not be responsible for mistakes in unrepeated messages from whatever cause they might arise. It was held to be reasonable, as the public had an opportunity to transmit unimportant messages for a small charge, and might secure accuracy in an important message at a moderate additional expense.

§ 518. **American Cases sustaining Repeating Clause.** — In the United States the courts are not unanimous in their decisions on this point, and there are two well-defined currents of opinion. In many States the courts, following the reasoning given in the English case and other similar reasons, have held that the stipulation which requires a message to be repeated before the company can be held liable for damages arising by reason of the negligence of the company or its operators in sending the message is, considering the risks of the telegraph employment, a reasonable stipulation, and that the charge of an additional half rate for the repetition is also a reasonable charge for the extra work of repeating the message. In these States, therefore, the courts hold that the stipulation substantially as given above is valid and forms a portion of the contract with the sender of the message.[1]

[1] Ellis *v.* American Telegraph Co., 13 Allen, 226; Grinnell *v.* Western Union Telegraph Co., 113 Mass. 299; Redpath *v.* Western Union Telegraph Co., 112 Mass. 71; Clement *v.* Western Union Telegraph Co., 137 Mass. 463; Passmore *v.* Western Union Telegraph Co., 78 Pa. St. 242; Kiley *v.* Western Union Telegraph Co., 109 N. Y. 231; Pearsall *v.* Western Union Telegraph Co., 124 N. Y. 267; Breese *v.* United States Telegraph Co., 48 N. Y. 132; Bennett *v.* Western Union Telegraph Co., 18 N. Y. S. Rep. 777; Birkett *v.* Western Union Telegraph Co., 61 N. W. Rep. 645; Riley *v.* Western Union Telegraph Co., 26 N. Y. Supp. 532, 28 N. Y. Supp. 581; Wann *v.* Western Union Telegraph Co., 37 Mo. 472; Becker *v.* Western Union Telegraph Co., 11 Neb. 87 (now changed by

§ 519. **Kentucky Case.** — In the earliest case in which this point was considered,[1] the court says, "I see no ground for saying that this condition is void. Without this precaution of repeating messages, mistakes by telegraph are unavoidable. And there is no principle of public policy that does or should prohibit a telegraph company from being prudent enough to protect themselves from ruin by requiring such a condition in the transmission of messages. Had the message been repeated in this instance, the mistake would probably not have occurred, and it is idle to say that the defendants were bound for a compensation of fifty cents to insure the message unconditionally and absolutely against all mistakes."

§ 520. **Maryland Case.** — In an early case in Maryland,[2] the court sustained the validity of the exemption, though maintaining that it did not apply to the facts of that case.

§ 521. **Missouri Case.** — In an early case in Missouri,[3] the court says, "Whether we regard telegraph companies as common carriers or as bailees, we see no reason why they may not specially limit their liabilities, subject to the qualification, however, that they will not be protected from the consequences of gross negligence. Deny them this right, and they will be utterly unable to protect themselves against

statute: Kemp *v.* Western Union Telegraph Co., 28 Neb. 661; Western Union Telegraph Co. *v.* Lowrey, 32 Neb. 732); Western Union Telegraph Co. *v.* Neill, 57 Tex. 283; Womack *v.* Western Union Telegraph Co., 58 Tex. 176; Western Union Telegraph Co. *v.* Hearne, 77 Tex. 83; United States Telegraph Co. *v.* Gildersleve, 29 Md. 232; Hart *v.* Western Union Telegraph Co., 66 Cal. 579; Camp *v.* Western Union Telegraph Co., 1 Metc. (Ky.) 164; Western Union Telegraph Co. *v.* Carew, 15 Mich. 525; Lassiter *v.* Western Union Telegraph Co., 89 N. C. 334; Pegram *v.* Western Union Telegraph Co., 97 N. C. 57, (overruled by Brown *v.* Postal Telegraph Cable Co., 111 N. C. 187); Western Union Telegraph Co. *v.* Elliott, 27 S. W. Rep. 219. Cf. *supra*, §§ 511, 512.

[1] Camp *v.* Western Union Telegraph Co., 1 Metc. (Ky.) 164.

[2] Birney *v.* New York & Washington Printing Telegraph Co., 18 Md. 341.

[3] Wann *v.* Western Union Telegraph Co., 37 Mo. 472.

the hazards and risks which are incident to the business in which they are engaged. We see nothing unreasonable in their declaring that they will not be responsible for unrepeated messages."

§ 522. **Massachusetts Case.** — In an early case in Massachusetts this point was also decided.[1] In this case the suit was an action of tort by the person to whom the message was sent for an error in the message. The trial court ruled that the telegraph company was bound to use ordinary care, attention, and skill in transmitting the message, in spite of the conditions and terms printed in the blank, but the Supreme Court granted a new trial. The opinion as touching this point was as follows: "There can be no doubt that, in the ordinary employments and occupations of life, men are bound to the use of due and reasonable care, and are liable for the consequences of carelessness or negligence in the conduct of their business to those sustaining loss or damage thereby. We can see no reason why this rule is not applicable to the business of transmitting messages by telegraph. But the rule does not operate so as to prevent parties from prescribing reasonable rules and regulations for the management of their business, or establishing special stipulations for the performance of services, which, if made known to those with whom they deal, and directly or by implication assented to by them, will operate to abridge their general liability at common law, and to protect them from being held responsible for unusual or peculiar kinds of business. Of course a party cannot, in such way, protect himself against the consequences of his own fraud or gross negligence, or the fraud or gross negligence of his servants or agents. Nor can he escape all liability or responsibility in the performance of the service or duty which he undertakes. But he may, to a certain extent, in the mode above indicated, limit the extent of his liability, or graduate the

[1] Ellis v. American Telegraph Co., 13 Allen, 226.

amount of his compensation according to the risk which he assumes, as well as by the nature of the service which he renders. It is upon this ground that it is held that a common carrier, although by the rules of law he is an insurer of the property entrusted to him, may regulate the extent of his liability by a notice, brought home to his employer and assented to by him either directly or by implication. This principle is especially applicable to an employment such as is carried on by the defendants, which is, in its nature, a public one, and which the party undertaking it is bound to exercise for every one who may seek his services, however onerous or hazardous may be the particular duty or labor which he is called on to perform."[1]

§ 523. **Michigan Case.** — In Michigan[2] the court upheld this stipulation, saying "The regulation, therefore, of most, if not all, telegraph companies operating extensive lines, allowing messages to be sent by a single transmission for a lower rate of charge, and requiring a larger compensation when repeated, must be considered as highly reasonable, giving to their customers the option of either mode, according to the importance of the message or any other circumstances which may affect the question. And as the compensation ought always to be in proportion to the risk assumed, the provision in these regulations in reference to insurance must be regarded also as just and reasonable."

§ 524. **Pennsylvania Case.** — In an early case in Pennsylvania[3] this point had a full discussion. The action was for error in the message, and was brought by the sender. The plaintiff contended that the stipulation was virtually a stipulation for immunity against the consequences of the telegraph company's negligence, and therefore invalid. The court, however, says, "The fundamental truth of the plaintiff's

[1] Ellis *v.* The American Telegraph Co., 13 Allen, 226, Am. Elec. Cases, p. 9.

[2] Western Union Telegraph Co. *v.* Carew, 15 Mich. 525.

[3] Passmore *v.* Western Union Telegraph Co., 78 Pa. St. 238.

contention is therefore undeniable, but, like most truths, is limited by other and collateral principles. A railway, telegraph, or other company, charged with a duty which concerns the public interest, cannot screen themselves from liability for negligence, but they may prescribe rules calculated to insure safety and diminish the loss in the event of accident, and declare that if these are not observed, the injured party shall be considered as in default and precluded by the doctrine of contributory negligence. The rule must, however, be such as that reason which is said to be the life of the law, can approve, or at the least, such as it need not condemn. By no device can a body corporate avoid liability for fraud, for wilful injury, or for the gross negligence, which, if it does not intend to occasion injury, is reckless of consequences, and transcends the bounds of right with full knowledge that mischief may ensue. Nor, as I am inclined to think, will any stipulation against liability be valid which has the pecuniary interest of the corporation as its sole object, and takes a safeguard from the public without giving anything in return. But a rule which in marking out a path plain and easily accessible as that in which the company guarantees that every one shall be secure, declares that if any man prefers to walk outside of it, they will accompany him, will do their best to secure and protect him, but will not be insurers, will not consent to be responsible for accidents arising from fortuitous and unexpected causes, or even from a want of care and watchfulness on the part of their agents, may be a reasonable rule, and as such upheld by the courts." The court upheld the usual stipulations exempting the company from negligence, as being such a reasonable rule.

§ 525. **Delay in Transmission or Delivery not covered by Exemption.** — Even in States where the courts sustain the clause exempting the telegraph company from liability for damages caused by negligence in the transmission of a

message unless it is repeated, on the ground that it is a reasonable regulation in the conduct of the business, or a reasonable term in the contract with the sender of the message, for the reasons above given,[1] they have limited their support by saying that the exemption will not apply to delay of the company in the transmission or negligence in the delivery of the message, as, for instance, if the message, after receipt at the office of destination, is not delivered at all or is delivered to the wrong person, or the transmission or delivery is delayed an unreasonable time, for the courts say that the exempting clause, as printed on the blanks of the company, could not, from the nature of things, be intended to apply to negligence in the delivery of the message after its arrival at the office of destination, since repetition could not affect such delivery at all, nor give notice to the sender of anything more than that the message was correctly received at the office of destination.[2] But it has been held that mere delay in transmission is covered by the exemption clause.[3]

§ 526. **Sending Message to Wrong Destination.** — There is a difference of opinion as to whether the clause exempting the telegraph company from negligence in the transmission and delivery of a message unless it is repeated, will protect the company in cases where the message never reaches the office of destination because it is sent to the wrong office through the negligence of the telegraph operator. The

[1] *Supra*, §§ 518–524.

[2] Western Union Telegraph Co. *v.* Fenton, 52 Ind. 1; Western Union Telegraph Co. *v.* Burrow, 30 S. W. Rep. 378; Thompson *v.* Western Union Telegraph Co., 106 N. C. 549; s. c. 107 N. C. 449; Western Union Telegraph Co. *v.* Graham, 1 Col. 230; Garrett *v.* Western Union Telegraph Co., 83 Iowa, 257; Gulf, Colorado & Santa Fé Ry. Co. *v.* Wilson, 69 Tex. 739; Western Union Telegraph Co. *v.* Lowrey, 32 Neb. 732; Western Union Telegraph Co. *v.* Lyman, 3 Tex. Civ. App. 460; Fleischner *v.* Pacific Postal Telegraph Cable Co., 55 Fed. Rep. 738; True *v.* International Telegraph Co., 60 Me. 9, 18.

[3] Birkett *v.* Western Union Telegraph Co., 61 N. W. Rep. 645.

better opinion seems to be that since the failure of the message to arrive at the office of destination would be shown by a failure of the operator at that office to repeat it back if the sender had paid for this repetition, the clause may reasonably be considered to have been intended by the parties to apply to this species of negligence, and therefore the clause will protect the company in such cases.[1] In the New York case cited, the telegram was written on a blank form containing the usual clause as to exemption of the company from negligence unless the message is repeated. The sender delivered it for transmission at the telegraph office in Olean, New York, addressed to Bradford, Pennsylvania. The direct line to this point not being in working order, the operator sent it to Buffalo, New York, for transmission from that point to its destination, at the same time telling the sender that it was duly sent. The message was never delivered at Bradford, Pennsylvania, and for this negligence the sender of the message brought suit. The court sustained the exemption of the telegraph company from liability in this case, saying that the facts of the case were directly within the provisions of the clause as to repetition of messages contained in the blank form, since if the sender had stipulated for the repetition of the message from its destination, the absence of such repetition would have shown that the message had not reached its destination. On the other hand, it has been held in Texas that if the message is sent to a wrong office of destination through the negligence of the operator who receives the message for transmission, and writes upon it the wrong address, the clause exempting the company from liability for negligence does not apply to this negligent act, for the reason that repetition would not have availed to rectify this mistake.[2] The reasoning of the courts in this Texas case does not seem conclusive, as it is difficult

[1] Kiley *v.* Western Union Telegraph Co., 109 N. Y. 231.

[2] Western Union Telegraph Co. *v.* Lyman, 3 Tex. Civ. App. 460.

to see why, if the sender of the message stipulated for its repetition back from the office of destination, this repetition, if reported to the sender, would not have disclosed the fact that the message had been sent to the wrong place, and therefore why the exemption clause should not be considered as covering this species of negligence.

§ 527. **Total Failure to Transmit.** — As the stipulation exempting the company from liability for negligence in the transmission or delivery of the message, unless it is repeated, necessarily applies from its wording to negligence in the transmission or delivery of a message, the courts have held that the wording impliedly excludes from the protection of the clause cases where no attempt has been made by the telegraph company to transmit the message, and therefore the clause in question will not protect the company from this species of negligence, that is, a total failure to transmit the message.[1]

§ 528. **Failure to Transmit on account of State of Line.** — Included in the above exception are cases where the telegraph operator receives a message for transmission, but fails to transmit it because the line is not in working order, and does not either notify the sender of the message of this fact or send the message by some competing or other line. In such cases, as has been seen before,[2] it is the duty of the telegraph company receiving the message for transmission when its wires are not in working order, either to make suitable arrangements for transmitting it over other lines, or to notify the sender of its inability to transmit the message, and if instead of doing this, it absolutely fails to transmit the message, the case comes under the rule laid

[1] Sprague *v.* Western Union Telegraph Co., 6 Daly, 200; 67 N. Y. 590; Birney *v.* New York & Washington Printing Telegraph Co., 18 Md. 341; Western Union Telegraph Co. *v.* Way, 83 Ala. 542; Garrett *v.* Western Union Telegraph Co., 83 Iowa, 277; Western Union Telegraph Co. *v.* Michelson, 21 S. E. Rep. 169; Fleischner *v.* Pacific Postal Telegraph Cable Co., 55 Fed. Rep. 738.

[2] *Supra,* § 402.

down in the preceding section, and this species of negligence is held by the courts not to be included in the exemption of the company from liability in the transmission and delivery of the message.[1]

§ 529. **Waiver of Exemption Clause.** — The telegraph operator receiving the message for transmission may waive the stipulation in its telegraph blank exempting it from negligence in the transmission or delivery of a message unless it is repeated, and this even though the telegraph blanks provide that no waiver or change of the contract can be made by an operator. Thus, for instance, where a person sent a telegram, and some time after it was sent inquired of the operator whether it would be advisable to have it repeated, and the operator informed him that it had gone through all right, and thereupon the sender did not have it repeated, the court held that the operator had, in fact, by his statements, waived the operation of the rule, and therefore it should be considered as no longer forming a part of the contract of transmission.[2]

§ 530. **American Cases holding Exemption invalid.** — In the foregoing sections the cases discussed have been those where the exemption clause in day messages in its usual form has been held valid, even so far as to exempt the company from the consequences of its own negligence. On the other hand, the courts in many States have held that this clause is against public policy, and either wholly void, or void in so far as it attempts to relieve the company from the consequences of its negligence or that of its servants, operators, or agents. The ground taken by the courts in these cases is that the great importance to the public of having messages safely transmitted, and the consequent necessity of holding telegraph companies to their strict legal obligation of diligence in the matter, is a sufficient foundation for deciding

[1] Fleischner *v.* Pacific Postal Telegraph Cable Co., 55 Fed. Rep. 738.

[2] Western Union Telegraph Co. *v.* Reeves, 27 S. W. Rep. 318.

that such stipulations cannot exempt from negligence, and that although in the case of individuals doing business together, such a stipulation in a contract as will exempt the party transacting the business from liability for negligence may be reasonable and valid, yet the telegraph company has such an advantage in dealing with its customers from the fact that it has a practical monopoly of the business of speedy transmission of messages, and that the interests of the customers will not permit them to do without these facilities, that any contract which may be entered into between the parties is subject to the inspection and revision of the court to determine its reasonableness, and that such stipulations as are forced upon the customer by the telegraph company releasing it from its obligation to perform its legal duty, are unreasonable and against public policy.[1]

§ 531. **Opinion to this Effect.** — This reasoning was well stated in an early case in Maine.[2] In this case the plaintiff, a lumber dealer in Bangor, delivered to the defendant company in Bangor, to be transmitted to his correspondent in Philadelphia, the following message: "Will sell 800 M. laths delivered at your wharf, two ten net cash. July shipment. Answer quick." The regular tariff rate was paid for transmission. The message delivered by the defendant

[1] Ayer *v.* Western Union Telegraph Co., 79 Me. 493; American Union Telegraph Co. *v.* Daughtery, 89 Ala. 191; Gillis *v.* Western Union Telegraph Co., 61 Vt. 461; Western Union Telegraph Co. *v.* Short, 53 Ark. 439; Brown *v.* Postal Telegraph Cable Co., 111 N. C. 187; Thompson *v.* Western Union Telegraph Co , 107 N. C. 449; Western Union Telegraph Co. *v.* Meredith, 95 Ind. 93; Western Union Telegraph Co. *v.* Blanchard, 68 Ga. 299; Western Union Telegraph Co. *v.* Shotter, 71 Ga. 760; Thompson *v.* Western Union Telegraph Co., 64 Wis. 531; Telegraph Co. *v.* Griswold, 37 Oh. St. 301; Sweatland *v.* Illinois & Mississippi Telegraph Co., 27 Ia. 432; Manville *v.* Western Union Telegraph Co., 37 Ia. 214; Aiken *v.* Western Union Telegraph Co., 69 Ia. 31; Tyler *v.* Western Union Telegraph Co., 60 Ill. 421; Western Union Telegraph Co. *v.* Graham, 1 Col. 230; Abraham *v.* Western Union Telegraph Co., 23 Fed. Rep. 315; Wertz *v.* Western Union Telegraph Co. (Utah), 27 Pac. Rep. 172.

[2] Ayer *v.* Western Union Telegraph Co., 79 Me. 493.

company to the Philadelphia correspondent was as follows: "Will sell 800 M. laths delivered at your wharf, two net cash. July shipment. Answer quick." Thus the word "ten" was left out. The Philadelphia party immediately returned by telegraph the following answer. Accept your telegraphic offer on laths. Cannot increase price of spruce." Letters passed between the parties afterwards, disclosing the error. Plaintiff shipped the laths at the price as received by his correspondent, and sued the telegraph company for the difference. The telegraph company defended on the usual exemption clause. The court, however, overruled this defence, saying, "Telegraph companies are quasi public servants. They receive from the public valuable franchises. They owe the public care and diligence. Their business intimately concerns the public. Many and various interests are practically dependent on it. Nearly all interests may be affected by it. Their negligence in it may often work irreparable mischief to individuals and communities. It is essential to the public good that their duty of using care and diligence be rigidly enforced. They should no more be allowed to effectually stipulate for exemption from this duty than should a carrier of passengers or any other party engaged in a public business."

§ 532. **Smith v. Western Union Telegraph Company.** — In the recent case of Smith *v.* Western Union Telegraph Company,[1] the court set forth the reasons for holding such stipulations void at some length, being substantially that telegraph companies are public servants, that as such they must bring to the discharge of their business that degree of care and skill that careful and prudent men exercise in like circumstances, and that any stipulation by which they attempt to relieve themselves of this liability is forbidden by the demands of sound public policy.

§ 533. **Gillis v. Western Union Telegraph Company.** — In a

[1] 83 Ky. 104.

case in Vermont this subject received a careful consideration.[1] The plaintiff in that case telegraphed from Rochester, N. H., to Brattleboro, Vt., "Send my bale here." The address Rochester, N. H., was changed in transmit to Rochester, N. Y., and the bale was sent to the latter place. The message was written on one of the ordinary day-message blanks, and was not repeated. The court in its opinion discussed the legal position of telegraph companies, and adverted to the decisions which allow them to exempt themselves from liability for negligence, and then continuing, says, "But however this may be, we are not prepared to follow this line of cases. As this is the first time this question has ever been before this court for decision, we are at liberty to adopt the view we regard as most just and reasonable, and the most consistent with sound public policy; and when we consider the relation of telegraph companies to the public, the character and extent of their business, and the duties and obligations incident thereto, we see no sufficient reason for distinguishing between ordinary and gross negligence in this behalf, and think it most just and reasonable, and most consistent with sound public policy, that they be not allowed to stipulate against liability for negligence of *any* kind, if there be more than one kind.

§ 534. **Same** (*continued*). — "Telegraph companies do not deal with their employers on equal terms. There is a necessity for their employment. They are created to promote public convenience, and until the introduction of the telephone, they were and practically still are, especially for considerable distances, without competition, save among themselves, in the transmission of intelligence by electricity. Their business has increased to vast proportions, and neither the commercial world nor the general public can dispense with their services. It is, therefore, just and reasonable that they should not be allowed to take advantage

[1] Gillis *v.* Western Union Telegraph Co., 61 Vt. 461.

of their situation and of the necessities of the public, to exact exemption from that measure of duty that the law imposes upon them, and that public duty demands."

§ 535. **Night Messages, Exemption not sustained in some States.** — Most telegraph companies receive messages to be sent during the night for delivery not earlier than the morning of the next ensuing business day at reduced rates. The blanks on which such messages are written generally contain a stipulation worded somewhat as follows: "On condition that the company shall not be liable for errors or delay in the transmission or delivery or for non-delivery of such messages, from whatever cause occurring, and shall only be bound in such case to return the amount paid by the sender."[1] This clause is clearly an absolute exemption of the company from all possible delinquencies, mistakes, delays, or neglects in transmission and delivery, and gives the sender of the message no opportunity to insure the receipt of the message in its original form by repetition back from the sending office.[2] This form of stipulation in the night message has been construed by the courts in quite a number of cases, and has often been held to be unreasonable and void.[3] The reasons for which such a stipulation is held to be against public policy and void, are well stated in the

[1] This clause is now frequently altered by the addition of the repeating clause of the day blank, in which case the reasoning of the following section does not apply.

[2] If a night message has the word "Day" printed across its face, this may mean that the blank is to be considered a day blank, and the stipulations do not apply, but this question is for the jury, on evidence of the intent of the company. Western Union Telegraph Co. *v.* Piner, 1 Tex. Civ. App. 301.

[3] Bartlett *v.* Western Union Telegraph Co., 62 Me. 209; True *v.* International Telegraph Co., 60 Me. 9; Smith *v.* Western Union Telegraph Co., 83 Ky. 104; Western Union Telegraph Co. *v.* Harris, 19 Ill. App. 347; Western Union Telegraph Co. *v.* Fontaine, 58 Ga. 433; Candee *v.* Western Union Telegraph Co., 34 Wisc. 471; Hibbard *v.* Western Union Telegraph Co., 33 Wisc. 558; Western Union Telegraph Co. *v.* Shotter, 71 Ga. 760; Marr *v.* Western Union Telegraph Co., 85 Tenn. 538.

case of Bartlett *v.* Western Union Telegraph Company:[1] "It is because of its broad provisions covering every case of non-fulfilment of duty under the law that we declare the rule unreasonable. In a case like this where a party has assumed a public or quasi-public employment, one which has become a commercial necessity, and to which business people must necessarily more or less resort, and in which they must trust entirely to servants, in the selection of whom they have no voice whatever, it would seem that there could be hardly a difference of opinion as to the unreasonableness of a rule which opens so wide a door for immunity from negligence if not from fraud. Though it may admit of serious doubt whether public policy would permit persons or companies occupying the relation to the business community which the defendants in this case do, to limit in any degree the liability imposed upon them by law, in view of the many decisions from courts of the highest respectability allowing it, we do not wish to be understood as denying it, nor, indeed, have we any occasion to do so in this case." "It will be noticed that the rule of these defendants in relation to night messages, that which we are now considering, has no provision for repeating the message, a provision upon which many of the cases rest." And considering the argument that although the stipulation may be unreasonable, yet it has been entered into by the parties fairly and intelligently, and should govern their rights and liabilities, the court says, "While we consider that a party may sometimes limit his liability by special contract beyond what he can by a rule or regulation, yet it is settled on a foundation too firm to be shaken that even contracts in violation of good faith and public policy cannot be sustained. The interests of the public must be protected, even though they clash with those of private individuals."

§ 536. **Exemption maintained in Some States.** — There have been, however, decisions to the effect that the stipulation

[1] 62 Me. 209.

in question, although it gives the sender no opportunity to insure the safe transmission of the message, and simply exempts the company from all liability from whatever cause occurring, is yet reasonable, because of the reduction in price at which the message is received, the courts holding that the telegraph company is not obliged to transmit messages at night, and that if it chooses to assume voluntarily this extra work, and to offer these facilities to the public at reduced rates, the sender of the message takes his risk in sending the message at this time, and the stipulation is therefore reasonable.[1] A fuller statement of the reasoning is this: The company, having a system of receiving and repeating message by which it can, as it supposes, insure accuracy, and having a certain fixed rate for ordinary messages, is willing to send messages during the night at half the ordinary rate (of course without repetition) provided that if the message is not received, the only liability of the company shall be to return the money. These terms are perfectly reasonable, for the company may justly suppose that a man having a message to send of pecuniary importance, will take the precaution of having it repeated, and certainly will not send it on a night or half rate blank, and relinquish in express words all claim for damages except the return of his money; and since many messages are of trivial importance, there is no good reason why a telegraph company might not afford the opportunity of sending such messages during a certain time and at a reduced rate, limiting its liability therefor, providing it also affords a reasonable opportunity of sending messages for the non-delivery of which it shall be liable to the amount of the damages sustained.[2]

[1] Aiken *v.* Western Union Telegraph Co., 5 S. C. 358; Schwartz *v.* Atlantic & Pacific Telegraph Co., 18 Hun, 157; Jones *v.* Western Union Telegraph Co., 18 Fed. Rep. 717; Western Union Telegraph Co. *v.* Neill, 57 Tex. 283.

[2] Schwartz *v.* Atlantic & Pacific Telegraph Co., 18 Hun (N. Y.), 157; Western Union Telegraph Co. *v.* Neill, 57 Tex. 238.

§ 537. **Whether applicable to Receiver of Message.** — The validity of such exempting clauses as are discussed above is naturally decided by considerations wholly independent of the question whether the matter arises in a suit by the sender or the receiver of the message, but the question whether, if valid, they bind the receiver as well as the sender, is one of some difference of opinion in the courts. This matter is discussed above.[1]

[1] *Supra*, §§ 499–507. Compare also, *post*, § 555 *et seq.*

CHAPTER XXVII.

LIMITATION OF TIME FOR THE PRESENTATION OF CLAIMS AGAINST TELEGRAPH COMPANY.

§ 538. Limitation of Time for the Presentation of Claims.
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§ 538. **Limitation of Time for the Presentation of Claims.** — Another special stipulation or regulation which telegraph companies commonly insert in their blanks is one which is intended to insure the presentation of all claims for damages arising out of negligence in the transmission or delivery of messages within a short time after the cause of action accrues, so that the company may collect the necessary evidence of the facts in the case, and may not be called upon, long after the occurrence, to answer charges which it has not preserved evidence to rebut.

§ 539. **Form of Limitation.** — The stipulation is not always in the same language, but an ordinary form is as follows: "The company will not be liable for damages in any case where the claim is not presented in writing within sixty

days after sending the message." Another is as follows: "The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission."

§ 540. **Generally held Reasonable.** — The courts have, with almost absolute uniformity, held that such a stipulation is *prima facie* a reasonable one for the telegraph company to make, at least so far as the sender of the message is concerned, its intention being to protect the company as above stated, and whether it be considered a term in the contract between the sender of the message and the telegraph company, or whether it be considered a regulation of the business brought to the notice of the sender and assented to by him,[1] it is held ordinarily to bind the sender who writes and signs a message on a blank form containing this stipulation.[2] In two States, however, the sixty day limit for making claims against a telegraph company has been held

[1] Compare *ante*, §§ 493–495.

[2] Wolf *v.* Western UnionTelegraph Co., 62 Pa. St. 83; Western Union Telegraph Co. *v.* Henderson, 89 Ala. 516; Western Union Telegraph Co. *v.* Dougherty, 54 Ark. 221; Hill *v.* Western Union Telegraph Co., 85 Ga. 425; Western Union Telegraph Co. *v.* Fairbanks, 15 Ill. App. 600; Western Union Telegraph Co. *v.* Jones, 95 Ind. 228; Western Union Telegraph Co. *v.* Yopst, 118 Ind. 249; Western Union Telegraph Co. *v.* Wilson, 108 Ind. 308; Western Union Telegraph Co. *v.* Trumbell, 27 N. E. 313; Cole *v.* Western Union Telegraph Co., 33 Minn. 227; 30 days: Smith-Frazier Boot & Shoe Co. *v.* Western Union Telegraph Co., 49 Mo. App. 99; Montgomery *v.* Western Union Telegraph Co., 50 Mo. App. 591; Massengale *v.* Western Union Telegraph Co., 17 Mo. App. 257; Barrett *v.* Western Union Telegraph Co., 42 Mo. App. 542; Young *v.* Western Union Telegraph Co., 65 N. Y. 163; Sherrill *v.* Western Union Telegraph Co., 109 N. C. 527; Western Union Telegraph Co., *v.* Dunfield, 11 Col. 335; Western Union Telegraph Co. *v.* Phillips, 2 Tex. Civ. App. 613; Western Union Telegraph Co. *v.* Culberson, 79 Tex. 66; Western Union Telegraph Co. *v.* Brown, 84 Tex. 55; Lester *v.* Western Union Telegraph Co., 84 Tex. 314; Western Union Telegraph Co. *v.* Rains, 63 Tex. 27; Western Union Telegraph Co. *v.* Meredith, 95 Ind. 93; Heimann *v.* Western Union Telegraph Co., 57 Wisc. 562.

to be unreasonable and void, the court in one case saying that if a sixty day limit is valid, a six day limit is also valid, and holding that such a limitation is against public policy as being in the nature of a conditional limitation allowing telegraph companies to escape liability for their own negligence.[1]

§ 541. **Wolf v. Western Union Telegraph Company.** — In an early case in Pennsylvania, which was one of the first where this question arose, the facts were that the message was given by the sender to the operator at the office of the company, the fees for transmission were paid, and the despatch was started on its way, but never reached its destination. The sender of the message brought suit for damages resulting from the failure to transmit the message to the destination. The company defended on the ground that a stipulation in the contract protected the company from claims which were not presented to it in writing within sixty days from the sending of the message. The court sustained the defence saying, "This is an agreement of the plaintiffs, and is binding on them unless contrary to law, or unless it is unreasonable or inconsistent with public policy. There is no statute infringed by it. It falls within none of the provisions of the acts of March, 1849, and April, 1851. It seems to be prohibited by no principle in law. . . . Not being contrary to law, the contract contained in the condition falls within the legal maxim "conventio vincit legem," unless it be so unreasonable as to render it contrary to public policy and therefore void. Though not wholly alike, telegraph companies and common carriers have some resemblance to each other in the public nature of the duties each performs under the duties imposed upon them by the Acts of 1849 and 1851 under the sanction of penalty. This public character of telegraph companies is admitted in the case of New York

[1] Pacific Telegraph Co. *v.* Underwood, 37 Neb. 315; Western Union Telegraph Co. *v.* Longwill, 21 Pac. Rep. 339.

& Washington Printing Telegraph Company *v.* Dryburg,[1] in relation to the duties which concern the public. The unreasonableness of the rules adopted by the companies must, therefore, be scanned with an eye to the public policy, but clearly it is not unreasonable for the telegraph company to require notice of claims for its defaults within a reasonable time before being held to answer for the alleged default. From the very nature of the business this may be essential to its protection against unfounded claims. These companies have often to wrestle with the elements themselves in the storms which prostrate their lines, which prevent their working, and are not to be held to a harsher rule than common carriers who are excused by the act of God. Within sixty days the cause preventing the transmission of a message on a particular day might be easily ascertained and shown, which, after a lapse of several years, could not be discovered or proved. It is urged that the employer might not discover the failure to send his message forward within this time. How far this fact would displace the condition it is not now proper to say, but the reason is inapplicable to this case where, from the nature of the message, its failure to reach its destination must be known, and was known immediately by the employer. Another reason justifying the reasonableness of this provision for notice of the claim is found in the multitude of messages transmitted, requiring the speedy knowledge of the claims to enable the company to keep an account of its transactions before, by reason of their great number, they come to be beyond recollection and control."[2]

§ 542. **Reasonableness of Time is for the Court.** — Whether the length of time stipulated by the telegraph company within which the presentation of claims must be made is *prima facie* reasonable, has been held to be a question for

[1] 35 Pa. St. 298.

[2] Wolf *v.* Western Union Telegraph Co., 62 Pa. St. 83.

the court, as being the construction of a written document. It has been held that thirty days is a *prima facie* reasonable time,[1] or even twenty,[2] and the usual limit of sixty days has been upheld in every instance.[3] The point which the courts consider in deciding as to the reasonableness of the time is, whether it gives the party interested in the transmission of the message sufficient time, with reasonable diligence, to ascertain whether or not the message has been properly transmitted and delivered, and if not, what damages result therefrom.[4] Naturally, the sending of a telegram in most cases would call for some reply or action on the part of the recipient towards the sender, the absence or nature of which would convey to the sender information from which he should naturally infer that the telegram had not been received, or had been changed in transmission, and this within a short time, and under ordinary circumstances sixty days would be sufficient.

§ 543. **Stipulation Unreasonable, when.** — Although the stipulation in question is generally held to be *prima facie* reasonable, as has been stated above, yet there may be cases in which it would be unreasonable. There was an intimation to this effect in Wolf *v.* Western Union Telegraph Company,[5] when the court hinted that if the whole time limited had elapsed before the party injured by the negligence of the company was aware of the accrual of his cause of action, the stipulation would be held to be unreasonable.

[1] Cole *v.* Western Union Telegraph Co., 33 Minn. 227; Massengale *v.* Western Union Telegraph Co., 17 Mo. App. 257; Western Union Telegraph Co. *v.* Dougherty, 54 Ark. 223.

[2] Heimann *v.* Western Union Telegraph Co., 57 Wisc. 562.

[3] See cases *supra*, § 540.

[4] Johnston *v.* Western Union Telegraph Co., 33 Fed. Rep. 362; Massengale *v.* Western Union Telegraph Co., 17 Mo. App. 257; Montgomery *v.* Western Union Telegraph Co., 50 Mo. App. 591; Heimann *v.* Western Union Telegraph Co., 57 Wisc. 562.

[5] *Supra*, § 541.

This point was discussed in a case in Missouri,[1] a case in which the whole time limited had elapsed before the plaintiff became aware of his right of action, but although the court admitted that in some cases this might render the stipulation unreasonable, yet in the case at bar it was apparent that the failure to learn of the cause of action arose from the plaintiff's own negligence. It may, however, be considered settled by the cases, that if the plaintiff shows that without his default, he did not become aware of his cause of action until either the whole of the time limited for presenting his claim to the telegraph company had elapsed, or so great a portion of it that the remainder was not reasonably sufficient for the purpose, the stipulation will be held to be unreasonable under such circumstances.[2] But if, however, although a great portion of the time has elapsed, sufficient remains for the plaintiff reasonably to ascertain and present his claim, the fact of the lapse of the greater portion will not excuse failure to present the claim within the remaining period.[3]

§ 544. **Reasonableness for the Jury, when.** — As in other cases in which the question of the reasonableness of any rule of conduct is involved, although, as was said above,[4] the court is to judge of the reasonableness where the construction of the written stipulation only is involved, or when the facts are undisputed and not of doubtful significance, yet if the question arises on disputed facts or upon undisputed facts, which, however, are capable of varied construction,

[1] Smith-Frazier Boot & Shoe Co. *v.* Western Union Telegraph Co., 49 Mo. App. 99.

[2] Ibid.; Western Union Telegraph Co. *v.* Jones, 95 Ind. 228, 233; Herron *v.* Western Union Telegraph Co., 57 N. W. Rep. 696; Western Union Telegraph Co. *v.* Phillips, 2 Tex. Civ. App. 613, and see *post*, §§ 553, 555–557.

[3] Heimann *v.* Western Union Telegraph Co., 57 Wisc. 562, and see cases *supra*, § 540, and *infra*, §§ 555–557.

[4] *Supra*, § 542.

the jury is the proper tribunal to pass upon the question of the reasonableness of the stipulation as applied to the circumstances in the case before the court.[1]

§ 545. **Assent to the Stipulation.** — When the blank form on which the sender of a telegram writes, and which he signs, has printed upon it the words "the company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message," or a similar phrase,it is generally held that, by signing, he becomes chargeable with knowledge of, and assents to the terms and conditions thus imposed, and they become part of the contract between him and the telegraph company.[2] It has, however, been held that the mere fact of the stipulation being printed on the blank signed by the sender is not conclusive on the question of plaintiff's knowledge of and assent to the stipulation; that, even then, the jury may find from the facts that he did not assent to the clause.[3]

§ 546. **Illinois Rule.** — Thus in Illinois a peculiar rule is adopted in regard to this stipulation, as well as to stipulations of all kinds in telegraph blanks. The court in that State holds that a limit of sixty days within which claims for damages must be presented to the telegraph company in writing, is a reasonable stipulation or regulation of its business, but that it must be shown that the plaintiff saw it on the printed blank, or knew of it, and assented to it in order to bind him, either as a term in his contract or as a regulation of the company's business brought to his notice, and the

[1] Western Union Telegraph Co. *v.* Phillips, 2 Tex. Civ. App. 613. Compare section on reasonable time, *supra*, § 409, and on reasonable care, *post*, §§ 738, 764.

[2] Hill *v.* Western Union Telegraph Co., 85 Ga. 425; Cole *v.* Western Union Telegraph Co., 33 Minn. 227; Heimann *v.* Western Union Telegraph Co., 57 Wisc. 562, and see cases *supra*, § 540, and analogous cases referring to the exemption from negligence, *supra*, §§ 494–497.

[3] Western Union Telegraph Co. *v.* Fairbanks, 15 Ill. App. 600.

question whether or not the plaintiff saw or knew of the stipulations on the blank printed form, and so made them a part of his contract, or assented to them as regulations, is a question of fact for the jury upon all the circumstances of the case,[1] and that mere signing of the blank itself is not conclusive, and, in fact, is not direct evidence of the plaintiffs having seen or known of the stipulation in question at the time of signing the blank. In one case in that State the only evidence as to the assent of the plaintiff to the stipulation as to the limit of time was the fact that his agent had signed the printed blank when sending the message, and the agent himself testified that he did not see or know of the stipulation at the time of signing the blank, and the court on appeal held that this was sufficient evidence for the jury to find that the plaintiff never saw or knew of the stipulation in question, and was not bound by it.[2] On this blank there was printed in large type the assent of the sender to the form of contract, but the court held that there must be evidence that he or his agent when signing the blank saw or knew of this phrase as well as the stipulation in question, and that this was true whether the stipulation in question was considered as part of a contract between the sender of the message and the telegraph company, or whether it was considered as a regulation of the telegraph business; that in either case there must be evidence that the person sending the message saw or knew of it before he will be bound by it.[3]

§ 547. **Can Sender object to the Stipulation.** — In most cases the stipulation under consideration, whether considered as a term in the contract between the sender of the message and the telegraph company, or as a regulation of

[1] Western Union Telegraph Co. *v.* Fairbanks, 15 Ill. App. 600.

[2] Ibid.

[3] Western Union Telegraph Co. *v.* Fairbanks, *supra;* Cf. Tyler *v.* Western Union Telegraph Co., 60 Ill. 421.

the business, and whether assented to or not by the sender, is at least not actively objected to by him.[1] In one case, however, the question has been brought up whether, if the person desiring to send the message refuses to agree to this stipulation and the company thereupon refuses to accept the message for transmission, the company is liable under a statute prescribing a penalty for refusing messages offered for transmission. The court, under the peculiar statutes of the State in question, holding a telegraph company to be a common carrier, and that it must receive messages as such under its full common-law liability, if the sender refuses to accept a limitation, held that the telegraph company could not compel the sender to assent to the regulation, nor could it refuse to accept the message without such limitation of its liability.[2] This decision would probably not be followed except in States having similar statutory provisions as to telegraph companies.

§ 548. **Stipulation not Repugnant to Statutory Duty.** — In most States it is held that there is nothing in the stipulation under consideration which is opposed to either the spirit or the letter of the statutes which require telegraph companies to serve the public with despatch and care, for the stipulation is not a protection against any negligence of the company, but merely one giving it opportunity to discover the cause of the error complained of, and to preserve evidence of it, and protecting the company from negligence of the plaintiff in delaying unnecessarily his suit. It is therefore generally held that this clause is valid, even in States which have statutes enjoining such duties on the companies.[3] Nor

[1] See cases *supra*, § 540.

[2] Kirby *v.* Western Union Telegraph Co., 55 N. W. Rep. (So. Dak.) 759.

[3] Western Union Telegraph Co. *v.* Jones, 95 Ind. 228; Sherrill *v.* Western Union Telegraph Co., 109 N. C. 527; Breese *v.* Western Union Telegraph Co., 48 N. Y. 132; Heimann *v.* Western Union Telegraph Co., 57 Wis. 562; *contra*, Western Union Telegraph Co. *v.* Kemp, 62 N. W. Rep. 541; see *post*, § 563.

is it opposed to statutes which inflict penalties on the telegraph companies for non-performance of the duties imposed upon them.[1]

§ 549. **As to Statutory Penalties.** — The courts are not uniform on the question whether the wording of this stipulation is broad enough to protect the telegraph company when an action is brought for recovery of a statutory penalty, and not for damages in tort or on the contract. In one set of decisions it is held that the phrase "claim for damages," as used in the stipulation in question, is not sufficiently broad to cover a claim for a statutory penalty, for "damages" is an indemnity or compensation in money paid to the person who has suffered injury, and is proportional to the amount of the injury received, while a penalty is an arbitrary punishment inflicted by law, in the nature of a fine, and has no reference to the actual damages sustained by the person suing for it, and therefore, if the telegraph company stipulates only for protection against "claims for damages," it will not be protected against actions for a statutory penalty, even though no notice of the intention to prosecute the suit has been given to the telegraph company within the time limited by the company.[2]

§ 550. **Same Subject** (*continued*). — In other cases, however, it is held that the phrase in question is broad enough to cover a claim for a statutory penalty, for the word "claim" covers every species of legal demand which may be made against the company, and the word "damages," in a broad and general signification means any sum which may be recovered by the plaintiff in a suit at law against the

[1] Montgomery *v.* Western Union Telegraph Co., 50 Mo. App. 591; Breese *v.* Western Union Telegraph Co., 48 N. Y. 132; Western Union Telegraph Co. *v.* Jones, 95 Ind. 228; compare *ante*, §§ 482, 514.

[2] Western Union Telegraph Co. *v.* Cobbs, 47 Ark. 344; Western Union Telegraph Co. *v.* Cooledge, 86 Ga. 104; Western Union Telegraph Co. *v.* James, 90 Ga. 254.

company.[1] The telegraph companies now generally insert the words "or statutory penalties" after the words "claims for damages," thus preventing any loophole of escape.

§ 551. **Cases of Non-Transmission not Included.** — This stipulation being in the nature of a forfeiture by the plaintiff of a right of action which would otherwise vest in him, has been held to be strictly construed, and will not be enlarged by construction so as to include cases which do not fall within its wording. Therefore when the stipulation provides that "no claim for damages shall be valid unless presented in writing within thirty days after sending the message," and the message in fact was never sent at all, that is, was never placed on the wires by the telegraph company, the stipulation does not apply, and the plaintiff will not be estopped from suing, even though he may never have made any formal claim upon the company, or has not made it within the time limited by the stipulation.[2] And it is held that proof that the message was never delivered is *prima facie* proof that it was never started on its way over the wires.[3] Although the courts say that in this case proof of non-delivery is *prima facie* proof of non-sending, yet it may be doubted whether anything more is meant than that the telegraph company which intends to rely upon the defence that no claim was made within the time limited by the stipulation must, as an element in that defence showing the beginning of the lapse of time, prove when the message was sent. It is noticeable that in the latest blanks the tele-

[1] Western Union Telegraph Co. *v.* Jones, 95 Ind. 228 ("any claim" was the phrase here, not limited to claims for damages); Montgomery *v.* Western Union Telegraph Co., 50 Mo. App. 591.

[2] Barrett *v.* Western Union Telegraph Co., 42 Mo. App. 542; Western Union Telegraph Co. *v.* Yopst, 118 Ind. 249; Western Union Telegraph Co. *v.* Way, 83 Ala. 542, 556.

[3] Barrett *v.* Western Union Telegraph Co., 42 Mo App. 542; Western Union Telegraph Co. *v.* Way, 83 Ala. 542, 556; Western Union Telegraph Co. *v.* Yopst, 118 Ind. 249.

graph company has changed the wording of the phrase so as to read "sixty days after the message is filed with the company for transmission," thus covering this point.

§ 552. **Beginning of Time Limit.** — In accordance with the wording of this stipulation (except in the modern form given in the preceding section), the time begins to run from the actual transmission of the message on the wires, and not from its receipt by the company, and therefore if the sending over the wires is delayed and the claim is presented in writing, or otherwise sufficiently presented, within the sixty days from the time of actual transmission of the message over the wires, although not within sixty days from the time of delivering it to the telegraph operator, the suit will be sustained.[1]

§ 553. **Ignorance of Sender no Excuse.** — The fact that the sender of the message does not know when the message is sent, or when the time begins to run against him, has no effect upon the lapse of time, provided there is still a reasonable time left for making his claim after he learns of his cause of action, *e. g.*, the fact that the sender of the message did not know of a delay in its transmission until some time after it occurred, does not delay the beginning of the lapse of time, provided sufficient time for presenting the claim still remains after he learned of the delay.[2]

§ 554. **Concealment of Accrual of Claim by Company.** — If the fact of the accrual of the cause of action is fraudulently concealed from the plaintiff by the telegraph company so that he does not, in fact, learn of his rights until after the time limit has expired, this fraudulent concealment on the part of the telegraph company operates to estop the company to set up this stipulation. Thus where the contents of a

[1] Western Union Telegraph Co. *v.* Trumbell, 27 N. E. Rep. 313; Western Union Telegraph Co. *v.* Yopst, 118 Ind. 249.

[2] Massengale *v.* Western Union Telegraph Co., 17 Mo. App. 257; Heimann *v.* Western Union Telegraph Co., 57 Wisc. 562; as to addressee, see *ante*, § 543; *post*, § 555–557.

telegram were disclosed by the agent who received it, but this disclosure was fraudulently concealed by the agent until after the expiration of the time limited for presenting claims, and was then discovered by accident, it was held that the sender was entitled to recover damages therefor, notwithstanding his failure to comply with the stipulation requiring him to present any claim for damages against the telegraph company within sixty days from the sending of the message.[1] It may be questioned whether this decision should not rather be supported on the ground that the stipulation in question was not intended by the parties to apply to any such claim as damages for the disclosure of the contents of a telegram. It cannot, of course, be contended that the stipulation in question, notwithstanding its general phraseology, is intended to apply to every claim for damages against the telegraph company. For instance, the clause unquestionably would not apply to a claim for damages to the person caused by the falling of a telegraph pole or other similar claim, and it may be doubted whether, when fairly construed, it is intended to apply to anything except claims for damages arising from negligence of the telegraph company in the transmission and delivery of the message, and not to any criminal or fraudulent act of the telegraph agents, whereby damage is incurred by the party sending the message.[2]

§ 555. **Operation of Stipulation on Addressee.** — The operation of this stipulation upon the person to whom the message is addressed is a matter of some difficulty on the decisions. The most satisfactory rule seems to be as follows. If the sender can be considered as the agent of the addressee for sending the message, as has been seen previously to be the case in many instances,[3] when the message concerns the business of the latter, then the addressee is bound by

[1] Gulf, Colorado & Santa Fe R. R. Co. *v.* Todd, 4 Tex. App. 555.

[2] Western Union Telegraph Co. *v.* Culberson, 79 Tex. 65.

[3] *Supra*, §§ 455–457.

the contract just as the sender would be, and if he learns of his damage while a sufficient portion of the limited time remains unelapsed, he is bound to present his claim within that time or forfeit his right.[1] If the message is delivered to the addressee on a printed form containing such a stipulation, but there was no such stipulation on the message as originally given to the company for transmission, the receiver is not bound in contract by this stipulation, because it formed no part of the original contract.[2] Such a stipulation in the blank on which the message is delivered may bind the receiver as notice to him of the rule.[3]

§ 556. **If Message is never delivered.** — But the foregoing rule is true only if the message is delivered, for if it never is delivered, the courts hold that the stipulation is unreasonable and void, as to the addressee, because even if he has a contract relation with the telegraph company, the addressee may not and presumably does not, in fact, know of the sending of the message at all, and it would be unreasonable to hold him bound to present within a limited time a claim which he is quite likely never to hear of.[4] In one case it was said that the claim must be presented within the same period of time after the addressee learns of the cause of action which has accrued to him, but it may be doubted whether this dictum would be followed.[5]

[1] Western Union Telegraph Co. *v.* James, 90 Ga. 254; Massengale *v.* Western Union Telegraph Co., 17 Mo. App. 257; Herron *v.* Western Union Telegraph Co., 57 N. W. Rep. Iowa, 691; Western Union Telegraph Co. *v.* Phillips, 2 Tex. Civ. App. 613; Western Union Telegraph Co. *v.* Culberson, 79 Tex. 66; Manier *v.* Western Union Telegraph Co., 94 Tenn. 442; Findlay *v.* Western Union Telegraph Co., 64 Fed. Rep. 459. Compare *ante*, § 499 *et seq.*

[2] Western Union Telegraph Co. *v.* Hinkle, 3 Tex. Civ. App. 518.

[3] *Post*, § 557; Manier *v.* Western Union Telegraph Co., 94 Tenn. 442. Compare *ante*, §§ 504–507.

[4] Johnston *v.* Western Union Telegraph Co., 33 Fed. Rep. 365; Sherrill *v.* Western Union Telegraph Co., 109 N. C. 532.

[5] Sherrill *v.* Western Union Telegraph Co., *supra.*

§ 557. **Time Limit as affecting Action of Tort by Addressee.** — In actions of tort by the addressee of the message, it is difficult to see how this limit of time in which claims must be made against the telegraph company for damages occasioned by error or negligence in sending the message can affect the plaintiff. In such cases the plaintiff has no privity with the sender of the message, but sues solely for the breach of duty by the telegraph company, *i. e.*, the failure of the telegraph company to perform its public duty of transmitting despatches promptly and with due care, and has nothing to do with the special contract between the sender and the telegraph company, and therefore whatever stipulations the sender may make with the telegraph company should not bind the addressee, nor does the sendee have such knowledge of the regulations of the company as to the conduct of its business as to make it contributory negligence on his part not to make the claim within the time limited by the telegraph company,[1] unless, possibly, it may be held that when the telegraphic message is delivered to the sendee upon a blank containing the stipulation in question, and he does not bring his suit within the time limited, the stipulation becomes binding upon him as being a reasonable regulation by the telegraph company in its dealings with him and brought to his notice.

§ 558. **What Statement is Necessary.** — In order to comply with the stipulation in question, it is not necessary for the plaintiff to set forth his claim in detail, but he must give the telegraph company such information in writing as will apprise the company of the nature of the claim.[2]

§ 559. **To whom Presentation made.** — It has been held that the telegraph operator at the place where the message was

[1] Johnston *v.* Western Union Telegraph Co., 33 Fed. Rep. 365; Herron *v.* Western Union Telegraph Co., 57 N. W. Rep. 691; Western Union Telegraph Co. *v.* Longwill, 21 Pac. Rep. 339. Compare *ante*, §§ 504–507.

[2] Western Union Telegraph Co. *v.* Brown, 84 Tex. 54; as to oral evidence of the demand, see *post*, § 562.

started is a proper person to whom to make claim for damages under the clause in question.[1] But on the other hand, it was said in a New York case that the operator was not a proper person upon whom to make such a claim.[2] A notice given to a messenger boy of the telegraph company to take to the local operator is not properly given.[3] A notice given by the wife will support an action by the husband for injury to the wife's feelings.[4]

§ 560. **Is bringing Suit Enough?** — It has been urged upon the courts in several cases, that although a formal statement of the claim in writing has not been presented to the telegraph company within the time limited by the stipulation in the contract, yet the fact that suit has been actually brought against the company within the time limited is a sufficient compliance with the stipulation to enable the plaintiff to maintain his action. The decisions of the courts upon this point are not unanimous. In Alabama it has been held that this is sufficient compliance. In this case the papers which were served upon the defendant company contained a full statement of the plaintiff's case;[5] and to the same effect is a case in Indiana,[6] and cases in Texas.[7]

In other cases, however,[8] it seems to be held that the bringing of suit and service of citation is not a compliance

[1] Western Union Telegraph Co. *v.* May, 27 S. W. Rep. 760; Western Union Telegraph Co. *v.* Blanchard, 68 Ga. 299; Hill *v.* Western Union Telegraph Co., 85 Ga. 430.

[2] Young *v.* Western Union Telegraph Co., 65 N. Y. 163, and cf. Massengale *v.* Western Union Telegraph Co., 17 Mo. App. 257.

[3] Western Union Telegraph Co. *v.* Terrell, 30 S. W. Rep. 70.

[4] Western Union Telegraph Co. *v.* Kinsley, 28 S. W. Rep. 831.

[5] Western Union Telegraph Co. *v.* Henderson, 89 Ala. 510.

[6] Western Union Telegraph Co. *v.* Trumbell, 27 N. E. Rep. 313.

[7] Western Union Telegraph Co. *v.* Karr, 5 Tex. Civ. App. 61; Western Union Telegraph Co. *v.* Piner, 29 S. W. Rep. 66.

[8] Wolf *v.* Western Union Telegraph Co., 62 Pa. St. 83; Western Union Telegraph Co. *v.* Ferguson, 27 S. W. Rep. 1048; Telegraph Co. *v.* McKinney, 2 Will. Ct. App. Cas. § 617.

with this stipulation. In some cases the papers served upon the defendant company do not state the full cause of action of the plaintiff, and therefore do not constitute a statement in writing of the plaintiff's claims. Possibly this distinction might reconcile the difference in the decisions of the various cases, *i. e.*, that where the papers served upon the defendant company contain a sufficient statement of the plaintiff's case, this constitutes a presentation of the claim in writing sufficient to comply with the stipulations of the contract, but if a citation merely is served, this does not.

§ 561. **Waiver.** — This stipulation in the contract between the parties may, like any other contract stipulation, be waived by the consent of both parties. This waiver is a question of fact for the jury unless the facts are undisputed, in which case the court will pass upon them and decide whether or not they constitute in law a waiver.

In a case in New York where the attorney for the plaintiff made out a partial statement in writing, and presented it to an operator of the defendant company, he took it and handed it back to the attorney, and told him that he had nothing to do with it, and knew nothing about it, and referred the attorney upstairs to the rooms of the executive officers; and the attorney went upstairs and asked for the treasurer, and was told that he was out of town; and further asked for Mr. Wade, who, on the paper that contained the despatch, was named as president of the defendant company, and was told that he was out of town; and he then left the office, taking with him the written statement, and did not, in fact, deliver it to the company until after the sixty days had elapsed; it was held that he had never presented it to the company within the meaning of the stipulation, and that none of the acts of the agents of the company, as set forth above, constituted a waiver of the contract stipulation.[1]

[1] Young *v.* Western Union Telegraph Co., 65 N. Y. 163. Cf. Findlay, *v.* Western Union Telegraph Co., 64 Fed. Rep. 461.

§ 562. **Same Subject** (*continued*). — In another case where the action was by the sendee of the message for negligent delivery, it was shown that the message was sent on a blank of the company, which had the usual stipulation as to time limited for the presentation of claims, being in this case thirty days. The plaintiff did not make any claim in writing within that time, but made application to the local office of the company, stating his claim for damages orally immediately upon finding out that the message as delivered to him was incorrect. This was twenty-four hours after it was sent. The local officers of the company, to whom he applied, informed him that they would look into the matter, and relying upon this promise, the plaintiff made no presentation in writing of his claim until eight days after the expiration of the time limited. The court held that nothing in these facts constituted a waiver of the stipulation on the part of the company, or any estoppel from insisting upon the time limit as a defence.[1] And in another case it was said that a mere oral promise to look it up or to look into the matter on the part of the operator is not a waiver of the stipulation.[2] On the other hand, it has been held that if the defendant company is orally notified of the claim, and requests time to investigate it and find where the blame rests, and afterwards reports to the plaintiff that the company was not to blame, without making any objection to the oral presentation of the claim, this constituted a waiver of the contract stipulation so far as to make the oral presentation sufficient.[3]

§ 563. **Statutory Regulation as to Notice of Claim.** — In Texas a statute has been enacted which declares that all limitations of time within which notice of claims against persons or corporations must be presented to them, which

[1] Massengale *v.* Western Union Telegraph Co., 17 Mo. App. 257.

[2] Western Union Telegraph Co. *v.* Yopst, 118 Ind. 249.

[3] Hill *v.* Western Union Telegraph Co., 85 Ga. 425.

prescribe a less period than ninety days for such presentation are void. This statute has been examined by the Supreme Court of Texas, and it was held that it was not unconstitutional, and that it was a complete answer to a defence set up by a telegraph company that the claim was not presented in writing to the company within the sixty days' limit prescribed upon the blank printed form on which the message was sent. This decision was inevitable under the statute which declared a limitation of a less period than ninety days to be void, but as no instance is known of similar statutes being adopted in other States, the question is of local interest only.[1] In the same State, a statute enacts that all notices are presumed to be given unless denied on oath by the party affected, and this presumption is conclusive, and a pleading denying such notice and not sworn to must be stricken out.[2] In Massachusetts, a statute enacts that no action for the recovery of such damages shall be maintained unless a claim therefor is presented in writing to the telegraph company, or some officer or agent thereof, within sixty days from the time when such right of action accrues.[3]

§ 564. **Suit barred by Informer's Statute.** — In one State it has been held that a suit for a penalty under a telegraph statute is barred by the expiration of the time limited for suits by informers generally, under a statute relating to that class of suits. In this case the telegraph company set up as a defence that the suit was an action brought by an informer, and that the statute of Georgia limited the time for bringing such suits to one year. The court sustained this defence, holding that the action was, in fact, in the nature of a suit by an informer, and as a matter of public policy, even if the plaintiff in such a case was not strictly an informer, yet

[1] Western Union Telegraph Co. *v.* Jobe, 6 Tex. Civ. App. 407.

[2] Texas Telegraph & Telephone Co. *v.* Seiders, 29 S. W. Rep. 258.

[3] Acts 1885, ch. 380, § 2; Compare also *ante*, § 548.

it was better that the action should be limited to one year from the accruing of the cause of action, than that it should be allowed to run twenty years, which would have been the case if the defence had not been sustained. The court alludes to the difficulty which the telegraph company would encounter at the expiration of so long a time in finding out the real cause of the accident, and collecting evidence for making its defence, and considers this sufficient reason for making the decision above stated.[1]

[1] Western Union Telegraph Co. *v.* Nunnally, 86 Ga. 503.

CHAPTER XXVIII.

MEASURE OF DAMAGES.

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§ 565. **General View.** — The question what damages plaintiff may recover in actions against telegraph companies for negligence in the transmission and delivery of messages has been discussed in a great number of cases. The general tendency has been to assimilate these actions to actions against common carriers for negligence in the transportation of goods, and the various rules applicable to common carriers have been applied by analogy to telegraph companies, but it cannot be said that the decisions are in perfect harmony in this application, although the leading principles announced by the courts have been uniformly the same.

§ 566. **Hadley v. Baxendale. Facts.** — The case which has furnished the courts both of England and America with the leading principles for this class of cases is the case of Hadley *v.* Baxendale,[1] which was a suit in the English Court of Exchequer against a common carrier. The facts in this case were as follows: Plaintiffs were proprietors of a mill in

[1] 9 Exch. 341.

Gloucester, England, which was propelled by steam, and which was engaged in grinding and supplying meal, flour, etc., to customers. The shaft of the engine broke, and it became necessary to send the broken shaft to a foundryman at Greenwich to serve as a model for casting or manufacturing another that would fit the machinery. The broken shaft, in the ordinary course of transportation, might be delivered at Greenwich on the second day after its receipt by the carrier. It was delivered to the defendants, who were common carriers between Greenwich and Gloucester, and who had told the plaintiffs the broken shaft would be delivered at Greenwich on the second day after its delivery to them if delivered at a given hour. The carriers were informed that the mill was stopped, but were not informed of the special purpose for which the broken shaft was to be forwarded to Greenwich. They were not told that the mill would remain idle until the new shaft could be returned, or that the new shaft could not be manufactured at Greenwich until the broken one arrived to serve as a model. There was delay beyond the two days in delivering the broken shaft at Greenwich, and a corresponding delay in re-starting the mill. No explanation of the delay was offered by the carriers. The suit was brought to recover damages for the lost profits of the mill caused by the delay in delivering the broken shaft. It was held that these damages could not be recovered.

§ 567. **Hadley v. Baxendale. Opinion of the Court.** — The rule governing the measure of damages in this case,[1] as stated by Baron Alderson, is as follows:

"Where two parties have made a contract which one of them has broken, the damages which the other ought to receive in respect to such breach of contract should be either such as may fairly and substantially be considered as arising naturally, that is, according to the usual course of things,

[1] 9 Exch. 341.

from such breach of contract itself, or such as may be reasonably supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. . . .

"Now if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they could reasonably contemplate, would be the amount of the injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, would only be supposed to have had in his contemplation the amount of injury which would arise generally and in the great multitude of cases not affected by any special circumstances from such a breach of contract. For had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them."

§ 568. **Two Branches of this Rule.** — The rule of damages, as announced in the case of Hadley *v.* Baxendale, is divided into two distinct branches. The first, that damages may be recovered by the plaintiff if they are the direct, natural, and proximate result of the breach of the contract; second, that indirect damages may be recovered if they can be reasonably supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of a breach. The rule is well stated in a case in Maryland.[1] "A party can only be held responsible for such consequences as may be reasonably supposed to have been in the contemplation of both parties at the time of making the contract, and

[1] United States Telegraph Co. *v.* Gildersleve, 29 Md. 232.

no consequence which is not the necessary and ordinary result of a breach can be supposed to have been so contemplated unless full information be imparted to the party sought to be held liable, at the time of entering into the engagement." "Sell fifty (50) gold," was the message in this case, and it was held not to give information as to indirect or collateral damages.

§ 569. **Statements of Rule.** — The rule is stated in a different form in a recent case in Mississippi, where the court, in discussing a case of tort brought by the addressee of the message, and considering the question of what damages may be recovered, said, "If such damages naturally and in the usual course of things flow from the breach, they may be recovered for the reason that the parties contracting are presumed to do so with reference to natural and usual sequences, but where, as in this case, no natural or usual consequences could be foreseen by the parties, either from the face of the message or from extraneous information, it is impossible to say that the particular consequences of the breach were within the contemplation of the parties.[1]

The same rule was also well expressed by the court in a New York case. "The defendant is liable for all direct damages which the parties to the contract would have contemplated as flowing from the breach if, at the time they had entered into the contract, they had bestowed proper attention to the subject, and had been fully informed of the facts."[2] This statement includes both branches of the rule. Under the second branch of this rule the important question is, whether the telegraph company was informed, at the time of making the contract of transmission, of the existence of the circumstances or transactions in respect to which the indirect consequential or special damages are claimed, either by the

[1] Western Union Telegraph Co. *v.* Clifton, 68 Miss. 307.

[2] Leonard *v.* New York, etc., Telegraph Co., 41 N. Y. 544.

language of the message or by extrinsic information furnished by the sender.[1]

§ 570. **Uncertain Damages.** — Both branches of the rule of damages, as stated above, are subject to the limitation that the damages claimed, whether as the direct result of the breach of the contract or negligence of the defendant or as special and consequential damages must be certain and not contingent or speculative. Or, in other words, the defendant must give sufficient proof to show the amount and nature of the damages which he has sustained, whether direct or special, and cannot claim damages which he might have suffered or profits which he might have made if the amount or fact of the damage is uncertain.[2] The rule and the reasoning which supports it was expressed at length in a Massachusetts case, as follows:

The party who has failed to fulfil a contract cannot be held liable for remote, contingent, and uncertain consequences, or for speculative or possible results which may have ensued on his breach of duty, although they may be traceable to that cause. The reason is, that damages of such a nature are not the natural or necessary incidents of a contract, and cannot be deemed to have been within the contemplation of parties when they agreed together. A rule of damages which should embrace within its scope all the consequences which might be shown to have resulted from a failure or omission to perform a stipulated duty or service would be a serious hindrance to the operations of commerce and to the transaction of the common business of life. The effect would often be to impose a liability wholly disproportionate to the nature of the act or service which a party had bound himself to perform and to the compensation paid and received therefor. The practical rule, founded on a wise policy, and at the

[1] United States Telegraph Co. *v.* Gildersleve, 29 Md. 232.

[2] Western Union Telegraph Co. *v.* Hall, 124 U. S. 454; Compare *post* §§ 582, 615, 617, 620, 626, 628.

same time consistent with good sense and sound equity, is that a party can be held liable for breach of a contract only for such damages as are the natural or necessary, and the immediate and direct results of the breach, — such as might properly be deemed to have been in the contemplation of the parties when the contract was entered into, — and that all remote, speculative, and uncertain results, as well as possible profits and advantages, and other like consequences which might have arisen from the fulfilment of the contract, must be excluded, as forming no just or legitimate basis on which to determine the extent of the injury actually caused by the breach.[1]

§ 571. **Causal Relation between Negligence and Damages.** — The damages recovered must be the result of the negligence complained of, and must sustain the relation of effect to the negligence as cause. For lack of this relation the plaintiff must fail to recover.[2]

The necessity for showing the relation of cause and effect between the negligence and the damages was stated in a New York case.[3] In this case X. telegraphed to plaintiff, "Send five hundred dollars." The message as delivered read, "Send five thousand dollars." Plaintiff sent $5000 by express, and X. absconded with it. Plaintiff brought suit claiming that the negligence of the defendant was the cause of his loss. The court held that the negligence of the defendant was the occasion of the loss and not its cause; that plaintiff's confidence in the person to whom he sent the money was wholly independent of any act of the telegraph company; and the mistake in the message simply furnished an opportunity to X. to get a larger sum than he otherwise would have done. The court says, —

[1] Squire *v.* Western Union Telegraph Co., 98 Mass. 237.

[2] Lowery *v.* Western Union Telegraph Co., 60 N. Y. 198; Western Union Telegraph Co. *v.* Liddell, 68 Miss. 1; Frazer *v.* Western Union Telegraph Co., 84 Ala. 487.

[3] Lowery *v.* Western Union Telegraph Co., 60 N. Y. 198.

§ 572. **Lowery v. Western Union Telegraph Company. Opinion of Court.** — "That there was negligence on the part of the defendant in changing the message before delivery from a request by Brown that the plaintiff should send him $500 to a request for $5000 is found by the referee, and the finding is fully justified by the proof; and that the plaintiff acted upon the message as delivered and sent the $5000 to Brown, who afterwards absconded, having appropriated the money to his own use, is also established. It is clear, also, that except for the negligent mistake of the defendant the loss would not have happened, or at most, it would not have exceeded the sum which Brown requested the plaintiff to send him. The question is therefore presented upon which the courts are frequently called to pass, whether there is such a connection between the wrong alleged and the resulting injury, that in the contemplation of law they stand related to each other as cause and effect, so as to give a cause of action against the wrong-doer, and make him chargeable with the loss. The law does not undertake to hold a person who is chargeable with a breach of duty to another, to all the possible consequences of his wrongful act. It in general takes cognizance only of those consequences which are the natural and probable result of the wrong complained of, and which, in the language of Pollock, C. B., in Rigley *v.* Hewett,[1] may reasonably be expected to result under ordinary circumstances from the misconduct. Every injury is preceded by circumstances, if any one of which had been wanting, the injury would not have happened. In some sense, therefore, each is a cause of the injury, but to fasten a legal responsibility for an injury upon every person whose wrongful act, however remote therefrom, had contributed to bring about a situation or condition which made the injury possible, would be an impracticable rule, and one which, if enforced, would in

[1] 5 Exch. 240.

most cases inflict a punishment wholly disproportionate to the wrong."

§ 573. **Division of Discussion.** — The subject of discussion of the measure of damages therefore divides itself into three classes which will be considered in the following order. First, what are such natural, direct, and proximate damages resulting from the negligent act complained of as may be recovered by the plaintiff. Second, what damages though not the natural, direct, and proximate result of the negligent act may be considered to have been contemplated by the parties in making the contract on account of their information in regard to the subject-matter of the damages claimed. Third, what damages, recoverable under either of the foregoing rules, are so certain in their nature as to allow recovery.

§ 574. **Direct, Natural, and Proximate Damages.** — The courts are uniform in holding that the plaintiff may recover any damages which are the natural, direct, and proximate results of the negligence of the telegraph company.[1]

The court, looking at the message itself, without other information, can say in such cases that the damages claimed by the plaintiff are related to the negligence of the defendant by the strict relation of direct, natural, and proximate cause and effect, and can hold that the damages may be recovered by the plaintiff whether or not, as a fact, the defendant company did contemplate these damages as resulting from its negligence. The rule in this aspect assumes the form

[1] Leonard *v.* New York, Albany & Buffalo El. Mag. Telegraph Co., 41 N. Y. 544; United States Telegraph Co. *v.* Gildersleve, 29 Md. 232; Western Union Telegraph Co. *v.* Clifton, 68 Miss. 307; Abeles *v.* Western Union Telegraph Co., 37 Mo. App. 558; Barrett *v.* Western Union Telegraph Co., 42 Mo. App. 542; Thompson *v.* Western Union Telegraph Co., 106 N. C. 549, 107 N. C. 449; Frazer *v.* Western Union Telegraph Co., 84 Ala. 487; Western Union Telegraph Co. *v.* Williford, 2 Tex. Civ. App. 574; 22 S. W. 244; Lane *v.* Montreal Telegraph Co., 7 Up. Can. C. P. 23; Squire *v.* Western Union Telegraph Co., 98 Mass. 237; Bodkin *v.* Western Union Telegraph Co., 31 Fed. Rep. 134.

that the defendant company is bound to consider that such damages will result from its negligence, on the familiar principle that a person is bound in the law to consider the natural and direct results of his act, and cannot be allowed to say that as a fact he did not consider them.[1] The law holds everybody to such a measure of reasonable foresight as to the consequences of his acts.[2] As a matter of fact, parties entering into contracts usually contemplate that the contract will be performed, and not that it will be violated. They rarely actually contemplate any damages which might flow from a breach of the contract, and very frequently do not have sufficient information to know what such damages would be.[3] But, as was stated above, they must be held to have considered the direct and natural sequences of the negligence in transmission of the message in the language delivered to them.

§ 575. **Instances of Direct Damages.** — In an early telegraph case the action was brought for error in transmitting a telegram from Windsor to Chatham. The facts were these. The plaintiff, owning a vessel for charter, had obtained a cargo of corn of eight thousand bushels from Detroit to Ogdensburg. The parties furnishing the cargo, however, were desirous of withdrawing from the contract, and suggested to him the advisability of getting another cargo. In endeavoring to do so, he sent the telegram in question to Chatham, the message being an inquiry of a party there whether the sender could get a cargo of eight thousand bushels of wheat there for his vessel. The message as delivered to the addressee inquired for a cargo of only three thousand bushels, and an affirmative answer was sent to the

[1] Western Union Telegraph Co. *v.* Clifton, 68 Miss. 307.

[2] Leonard *v.* New York, Albany & Buffalo El. Mag. Telegraph Co., 41 N. Y. 544; De Rutte *v.* New York, Albany & Buffalo El. Mag. Telegraph Co., 1 Daly, 547: Fleischner *v.* Postal Telegraph Cable Co., 55 Fed. Rep. 738.

[3] Leonard *v.* New York, etc., Telegraph Co., 41 N. Y. 544.

plaintiff, who thereupon released his other cargo and sent his vessel from Detroit to Chatham, where the mistake was discovered. The vessel took the three thousand bushels and returned to Detroit, seeking more cargo, but obtaining none, carried the three thousand bushels to Oswego, its destination. The court held that the only direct damages naturally flowing from the default of the defendants was a reasonable compensation for sending the vessel to Chatham and returning without a freight; that the loss of freight on the five thousand bushels deficiency was not a damage which plaintiff could recover, since it did not appear that if the message had been sent correctly he could have got a cargo of eight thousand bushels; that the loss of freight on the cargo of corn was a real loss, but being a special damage not communicated to or known by the defendant at the time the message was sent, it could not be considered as contemplated by both parties at the time.[1] This case is a good instance of the application of the three rules relating to damages. First, that direct, natural, and proximate damages may be recovered in any event. Second, that indirect, collateral, or consequential damages can only be recovered when the telegraph company has information leading it to believe that such damages may result from its negligence. Third, that contingent or uncertain profits or losses cannot be recovered.

§ 576. **Same** (*continued*). — In a Massachusetts case the defendant telegraph company undertook to transmit a message which on its face purported to be an acceptance of an offer for the sale of merchandise. It was held that the natural consequence of a failure to transmit such a message was that the party to whom the message was addressed, not receiving a reply to his offer to sell the merchandise in due season, would dispose of it to another person, and the senders might be unable to procure an article of like kind and quality at the same price, and in order to obtain it, would

[1] Lane *v.* Montreal Telegraph Co., 7 Up. Can. Com. Pl. 23.

be obliged to pay a higher price for it in the market than they would have paid if the prior contract for its purchase had been completed by the seasonable delivery of their message by the telegraph company; and therefore the sum which would compensate the plaintiffs for the loss and injury sustained by them would be the difference, if any, between the price which they agreed to pay for the merchandise by the message which the defendant undertook to transmit, and the sum which the plaintiffs would have been compelled to pay at the same place in order by the use of due diligence to have purchased the like quantity and quality of the same species of merchandise.[1]

§ 577. **Same** (*continued*). — In a case in Ohio,[2] the facts were that a national bank, being applied to to cash two drafts drawn upon people in New York, and being doubtful of the credit of the drawer and the solvency of the drawees, wrote to a bank cashier in New York, and asked him to investigate, and if there was any doubt, to telegraph before Saturday, otherwise they would cash the drafts. The New York bank official telegraphed back, "Parties will accept if bill of lading accompanies the draft. Parties stand fair." This message was never delivered. The drawer got the money and absconded. The bank sued the telegraph company, but the court held that the negligence of the telegraph company was not the cause of the loss of the bank. In fact, the bank had paid over the money before it could possibly have received the telegram, but it claimed that if it had received the message it would have recovered the money back; but the court held that there was not sufficient evidence of any effort or intention on their part to recover the money back, and even if they had, it was not shown that they could have; and moreover the loss was not one which could be attributed to the negligence of the telegraph company, since the message gave no information of it.

[1] Squire *v.* Western Union Telegraph Co., 98 Mass. 237.

[2] First National Bank *v.* Western Union Telegraph Co., 30 Oh. St. 555.

§ 578. **Indirect or Collateral Damages.** — In addition to the direct, natural, and proximate damages which plaintiff may recover, in many instances, special damages may be recovered which are not the direct result of the negligence of the defendant, but which are, in fact, the result of such negligence, although the relation of cause and effect is not direct or apparent upon the face of the message.[1] In such cases the question depends upon what information, either from the language of the message, or from the sender, or otherwise, the telegraph company may have had in regard to the damages so claimed. This rule is based upon the second branch of the rule in Hadley *v.* Baxendale,[2] viz., that the telegraph company is liable for damages which may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach. Ordinarily such special damages cannot be recovered, since the telegraph company has had no information which would show it that these damages would be likely to result from its negligence; but if special information has been given to the telegraph company, either explaining the nature of the message, so as to put the telegraph company in possession of knowledge that the special damages which are claimed are involved in the transaction to which the message relates, or informing the telegraph company of collateral contracts dependent upon the transaction involved in the telegram, the telegraph company in such case has the wider

[1] Leonard *v.* New York, Albany & Buffalo El. Mag. Telegraph Co., 41 N. Y. 544; United States Telegraph Co. *v.* Gildersleve, 29 Md. 232; Western Union Telegraph Co. *v.* Clifton, 68 Miss. 307; Abeles *v.* Western Union Telegraph Co., 37 Mo. App. 558; Barrett *v.* Western Union Telegraph Co., 42 Mo. App. 542; Thompson *v.* Western Union Telegraph Co., 106 N. C. 549; 107 N. C. 449; Frazer *v.* Western Union Telegraph Co., 84 Ala. 487; Western Union Telegraph Co. *v.* Williford, 2 Tex. Civ. App. 574; 22 S. W. Rep. 244; Lane *v.* Montreal Telegraph Co., 7 Up. Can. C. P. 23; Squire *v.* Western Union Telegraph Co., 98 Mass. 237; Bodkin *v.* Western Union Telegraph Co., 31 Fed. Rep. 134.

[2] 9 Exch. 341.

measure of responsibility, and is held liable for the special damages claimed.[1]

§ 579. **Baldwin v. United States Telegraph Company.** — This branch of the rule in Hadley *v.* Baxendale has been well stated in a case in New York.[2] "Whenever special or extraordinary damages, such as would not naturally or ordinarily flow from a breach, have been awarded for the non-performance of contracts, whether for the sale or carriage of goods, or for the delivery of messages by telegraph, it has been for the reason that the contracts have been made with reference to peculiar circumstances known to both, and the peculiar loss has been in the contemplation of both, at the time of making the contract, as a contingency that might follow the non-performance. In other words, the damages given by way of indemnity have been the natural and necessary consequences of the breach of contract, in the minds of the parties, interpreting the contract in the light of the circumstances under which, and the knowledge of the parties of the purpose for which, it was made, and when a special purpose is intended by one party but is not known to the other, such special purpose will not be taken into account in the assessment of the damages for the breach."

§ 580. **Collateral Contracts.** — It is evident that where the negligence of the telegraph company inflicts damage upon the plaintiff by causing the breach of contracts collateral to the main transaction involved in the telegram, such damages are not openly the direct, natural, and proximate results of the negligence complained of, but are apparently indirect, and therefore it is necessary for the plaintiff to show not only the causal relation between the damage and the negligence, but also information on the part of the telegraph company received at the time of sending the message suffi-

[1] Ib. Special damages must be specifically pleaded. Acheson *v.* Western Union Telegraph Co., 96 Cal. 641.

[2] Baldwin *v.* United States Telegraph Co., 45 N. Y. 744.

cient to put it in possession of the material facts relating to the collateral contracts, this information being generally found either in the language of the message or in information given by the sender at the time of sending the message.[1]

§ 581. **Landsberger v. Magnetic Telegraph Company.** — Thus in an early case the plaintiffs in San Francisco agreed with X. to purchase for him a number of revolvers to be shipped from New York on or before a certain date, and agreed to pay the sum of $500 as liquidated damages in case of their failure to perform the contract. One of the plaintiffs took steamer from San Francisco to Panama, intending to go across the land and up to New York and purchase the revolvers. He was, however, taken prisoner in South America and detained there. He sent a telegram to R. S. Landsberger, 28 Broad St., New York, telling him to get $10,000 from the Western Express Company, this being the money necessary to pay for the revolvers. The message was negligently transmitted, and when it was received in New York the name read "Lammeyer." There being no such person in the directory, the New York office telegraphed back to the New Orleans office for better address, and a storm coming on in the mean time, and breaking some of the lines, communication in reply was delayed three or four days, at the end of which time the correct address was returned and the message delivered to Landsberger. It was then, however, beyond the date when the ammunition was to be shipped, and the plaintiffs had to pay $500 liquidated damages. They brought suit to recover this amount, and also a commission of $400, which was lost on this trade, as well as the expenses of telegrams in the matter. The court held that while the negligence of the defendant was undoubtedly the cause of the loss of the plaintiffs, yet the loss was not of such a character as could be considered to have entered

[1] True v. International Telegraph Co., 60 Me. 9; Landsberger v. Magnetic Telegraph Co., 32 Barb. N. Y. 530.

into the minds of the parties as contemplated by them in case of breach of contract to forward the telegram.[1]

§ 582. **Certainty of Damages.** — The third rule stated in the beginning of this chapter was that the damages which the plaintiff may recover must be certain.[2] This certainty may be as to amount, for it is held that if the plaintiff cannot show that his loss is a definite and certain amount, he cannot recover any damages.[3] Thus if the loss of an offer of employment is made the basis of damages, and there is no evidence to show for how long a term the employment was offered, or on what terms as to salary or wages, the plaintiff can recover nothing, because he cannot show how much he ought to recover.[4] But if the plaintiff shows the amount of work to be done and the price, he renders certain what damages he has suffered.[5] So if the telegram offers articles for sale at a certain price, but does not state any definite quantity as offered, the damages for error in the transmission of the telegram are too indefinite.[6] Similarly damages which are claimed for future profits of a business, and which are based on estimates of past business or other conjecture, are not recoverable because of their uncertainty.[7]

§ 583. **Illegal Contract.** — Another limitation to the rule of

[1] Landsberger *v.* Magnetic Telegraph Co., 32 Barb. 530.

[2] *Supra*, § 570.

[3] Kenyon *v.* Western Union Telegraph Co., 100 Cal. 454; Merrill *v.* Western Union Telegraph Co., 78 Me. 97; Western Union Telegraph Co. *v.* Smith, 76 Tex. 253; Pennington *v.* Western Union Telegraph Co., 67 Ia. 631.

[4] Kenyon *v.* Western Union Telegraph Co., *supra;* Merrill *v.* Western Union Telegraph Co., *supra.*

[5] Western Union Telegraph Co. *v.* Bowen, 84 Tex. 476.

[6] Pennington *v.* Western Union Telegraph Co., 67 Ia. 631.

[7] True *v.* International Telegraph Co., 60 Me. 9; Leonard *v.* New York, Albany & Buffalo El. Mag. Telegraph Co., 41 N. Y. 565; Rich Grain Distilling Co. *v.* Western Union Telegraph Co., 13 Ky. L. R. 256; Western Union Telegraph Co. *v.* Crall, 39 Kan. 580: Western Union Telegraph Co. *v.* Hall, 124 U. S. 454; Hibbard *v.* Western Union Telegraph Co., 33 Wisc. 558.

damages is that when the damages that the plaintiff claims flow from an illegal contract, the plaintiff cannot recover them. For instance, if the message in question relates to buying and selling stock, wheat, or any other articles, on futures or margins, or other gambling methods, the better decisions are to the effect that the court will not allow the plaintiff to recover, and as this rule is based on the illegality of the transaction itself, it would seem that the information of the telegraph company as to the real nature of the transaction was immaterial, and that whether or not the message disclosed the illegality of the transaction or the telegraph company had no knowledge in regard to it, the damages cannot be recovered.[1]

§ 584. **Georgia Case.** — Thus, in a case in Georgia,[2] the telegram, as given to the company, was,—

"Rome, Ga., 10th March, 1887.

"To S. H. Phelan, Atlanta, Ga.

"Close hundred barrels May pork, continue instructions remainder. Sell fifty bags June coffee all to-day's close; close four thousand bushels short May wheat if reach eighty-two three quarters or eighty.

"C. H. Cothran & Co."

The word "sell" was omitted from the message as delivered.

The plaintiffs who sent the telegram did not know of the error till about the 16th of March. Their agent, Phelan, closed out the coffee, so that instead of fifty bags being sold, they were closed out. The court decided that the contract on which the injury by the plaintiffs was sustained, being a contract relating to futures in coffee, and those contracts being illegal by the laws of Georgia, the damages sustained by reason of the breach of the contract of telegraphy could

[1] Melchert *v.* American Union Telegraph Co., 11 Fed. Rep. 193; Cothran *v.* Western Union Telegraph Co., 83 Ga. 25.

[2] Cothran *v.* Western Union Telegraph Co., 83 Ga. 25.

not be measured by the standard of the speculative contract, overruling the case of Telegraph Company *v.* Blanchard.[1] The reason of this latter decision was that at the time it was made, contracts between brokers and their principals were considered obligatory, notwithstanding the vitiating element of speculating in futures; but this principle was overruled by the case of Bank *v.* Cunningham.[2]

§ 585. **Same Subject** (*continued*). — But the defendant must show everything necessary to prove the contract illegal. Thus, if the dealing in a kind of merchandise is alleged to be illegal because in fact no purchases were to be made nor any future deliveries, and the transaction was in effect merely betting on future prices, the fact that no deliveries of the goods were to be made must be shown by the telegraph company.[3] Nor can the plaintiff recover damages based on his own breach of a collateral contract. Thus if an offer of employment is telegraphed to a person, and the delivery is delayed so that he fails to receive it until after another person has been employed by the sender, and the person to whom the telegram is sent was, at the time of sending, under contract to work for a third person, he can recover no damages, for the law will not allow damages based on his breach of contract.[4]

§ 586. **Knowledge of Telegraph Company.** — The foregoing rules show the importance of ascertaining in each case exactly the knowledge of the telegraph company as to the nature of the transaction involved in the despatch, since on this knowledge depends in a large measure the scope of the damages which the plaintiff can recover. The sources of this information may be four. First, the language of the message as construed by the court on all legal sources of interpretation. Second, information given by the sender to

[1] 68 Georgia, 299. [2] 75 Ga. 366.
[3] Daughtery *v.* American Union Telegraph Co., 75 Ala. 168.
[4] Freeman *v.* Western Union Telegraph Co., 93 Ga. 230.

the operator at the time of sending the message. Third, general notoriety of facts concerning the transaction involved in the message; and fourth, knowledge obtained by the operator from other sources.

§ 587. **Information from the Language of the Message.** — It is obvious that the multitude of cases prevents the discussion of what information each message conveys, but it is also evident that messages may be divided into two general classes. First, those whose language is wholly obscure, *i. e.*, messages written in cipher; and second, those whose language is more or less intelligible to the average telegraph operator. Cipher messages will be first discussed.

§ 588. **Cipher Messages.** — In order to secure secrecy in the transmission of telegrams, arrangements are often made between commercial houses and individuals for codes of words to be used in telegraphing, each word standing for a clause or phrase; and messages sent in this cipher language, though intelligible to the parties sending and receiving, are wholly unintelligible to persons not having the key. It is obvious, therefore, that the language of such a telegram conveys no information whatever to the telegraph company of the transaction to which it relates, or the consequences likely to flow from negligence in its transmission or delivery. It is therefore held in most cases, that a message which is wholly unintelligible in its language, because it is written in cipher, does not render the telegraph company liable for any damages which may result from negligence in its transmission or delivery, unless information dehors the message has been given which puts the telegraph company in possession of facts relating to the real purport and object of the message, or unless some special contract as to its transmission has been made. Decisions following this line of argument have been rendered in many cases.[1]

[1] Sanders *v.* Stuart, 1 Com. Pl. Div. 326; Mackay *v.* Western Union Telegraph Co., 16 Nev. 222; Candee *v.* Western Union Telegraph Co., 34 Wisc. 471; Primrose *v.* Western Union Telegraph Co., 154 U. S. 1;

§ 589. **English Rule; Sanders v. Stuart.** — The first case where this rule was held in England was the case of Sanders *v.* Stuart, where the court held that damages for the transmission of a cipher message could not be recovered.[1] The court says, "We think the rule in Hadley *v.* Baxendale applies, and the damages recoverable are nominal only. It is not necessary to decide, and we do not give any opinion how the case might be if the message, instead of being in language utterly unintelligible, had been in plain and intelligible words. It was conveyed in terms which, so far as the defendant was concerned, were simple nonsense. For this reason the second part of Mr. Baron Alderson's rule clearly applies. No such damages as above named could have been reasonably supposed to have been in the contemplation of both parties at the time they made the contract as a probable result of the breach of it for the simple reason that the defendant did not know what the contract was about nor what nor whether any damage would follow from the breach of it, and for the same reason, viz., the total ignorance of the defendant as to the subject-matter of the contract, an ignorance known to and, indeed, intentionally procured by the plaintiff, the first portion of the rule applies also, for there are no damages more than nominal which can fairly and reasonably be considered as arising naturally and according to the general course of things from the breach of such a contract as this."

§ 590. **United States Rule.** — The leading case in America is Candee *v.* Western Union Telegraph Company.[2] In this case the facts were that the plaintiff was a banker and broker

Abeles *v.* Western Union Telegraph Co., 37 Mo. App. 554; Western Union Telegraph Co. *v.* Martin, 9 Ill. App. 587; Daniel *v.* Western Union Telegraph Co., 61 Tex. 452; Shields *v.* Washington Telegraph Co., 9 Western L. Journal, Mch. 1852; Hill *v.* Western Union Telegraph Co., 20 S. E. Rep. 135; Western Union Telegraph Co. *v.* Wilson, 32 Fla. 527; Cannon *v.* Western Union Telegraph Co., 100 N. C. 300.

[1] Sanders *v.* Stuart, 1 Com. Pl. Div. 326. [2] 34 Wisc. 471.

doing business in Milwaukee, and engaged in buying and selling by telegraph in the New York Stock Exchange gold, government bonds, and railway shares, through his brokers and agents in New York, in which business he had been engaged many years prior to the date of the message in question, sending and receiving daily messages in cipher. The message on which the suit was based was as follows: "Arch Barlier Henry Augusta." This message, when translated, meant "Buy for my account and answer by telegraph 250 shares Chicago and Northwestern common stock." In the trial court the plaintiff was allowed to recover the difference between the price of said stock at the time the telegram ought to have been delivered and the price at which it was bought subsequently when the non-transmission of the message was discovered. This decision was reversed in the Supreme Court, the court saying as follows: —

§ 591. **Opinion in Candee v. Western Union Telegraph Company.** — "There appears to be no division of opinion among the courts that in contracts of this class (*i. e.*, for transmission of telegrams) the measure of damages to be recovered is the same as that which obtains in actions upon contracts in general, the rule for the assessment of which has ever been regarded as correctly expressed in the leading case of Hadley *v.* Baxendale. . . . It cannot be assumed that any amount of damages or any pecuniary loss or injury will naturally ensue or be suffered according to the usual course of things from the failure to transmit a message the meaning and import of which are wholly unknown to the operator. Ignorant of its real nature and importance, it cannot be said to have been in his contemplation at the time of making the contract that any particular damage would be the probable result of a breach of the contract on his part. . . . These facts of the case, however much they may tend to show negligence in the operator, fail to bring the case within the rule for the assessment of damages above stated. The operator

cannot be said to have contemplated a rise in the value of stocks by which the plaintiff became a loser as a probable result or one of the probable results of his failure to transmit the message."

§ 592. **Western Union Telegraph Company v. Martin.** — In the case of Western Union Telegraph Company *v.* Martin,[1] the message was as follows. "Excited elaborate lordship educate punctual Arab boxes lordship side pieces lunar sixteen cherub a bargain see Williams timid." The court held that a cipher telegram, if erroneously transmitted, only gives a right to recover nominal damages, saying, "As the message in the present case was meaningless to the company's operator, and furnished no information as to the nature and extent of the business to which it related, whether it was an order to buy or sell pork, or any other commodity, whether it contained advices as to the state of the market, or whatever else its real import was, it would be absurd to claim that the company either had in contemplation, at the time of transmitting it, damages for a loss on the sale of pork, or expenses incurred in respect thereof." The court quotes the rule as laid down by Baron Alderson in Hadley *v.* Baxendale,[2] as being recognized everywhere and acted upon by the courts in this country, and also the rule as laid down in Griffin *v.* Colver,[3] by Mr. Justice Selden, "The party injured is entitled to recover all his damages, including gains prevented as well as losses sustained, and this rule is subject to but two conditions: the damages must be such as may be fairly supposed to have entered into the contemplation of the parties when they made the contract; that is, they must be such as might naturally be expected to follow its violation, and they must be certain both in their nature and in respect to the cause from which they proceed," and says, "Applying these principles to the case of a message

[1] 9 Ill. App. 587.
[2] 9 Exch. 341.
[3] 16 N. Y. 489.

delivered to a telegraph company, it seems clear that in order to charge the company for ulterior and remote consequences, of which, from the face of the message, it could not be advised, it is the duty of the sender to disclose to the company the purport and meaning of the communication presented for transmission.[1]

§ 593. **United States Supreme Court Rule. Primrose v. Western Union Telegraph Company.** — The question has received an authoritative decision to the same effect in a case in the Supreme Court of the United States,[2] which binds the Federal courts, and would be of great authority in any State court. In this case the message was in cipher, and the court held that only nominal damages could be recovered, giving a thorough discussion of the principles involved. This case has already been followed in at least one State court of final decision.[3]

§ 594. **Substantial Damages in some States.** — There have, however, been quite a number of decisions which allow the plaintiff to recover substantial damages when the message is in cipher, to the same effect and in the same manner as if the message were written in intelligible language.[4] The principle in these decisions is that owing to the importance of telegraphy, and the necessity of keeping the company to a high standard of efficiency, as required by the statutes, the courts will consider that any telegram, even if unintelligible, notifies the company that it is important that it should be delivered promptly and correctly.

§ 595. **Alabama Cases.** — The most important case on this

[1] Western Union Telegraph Co. *v.* Martin, 9 Ill. App. 587.

[2] Primrose *v.* Western Union Telegraph Co., 154 U. S. 1; *post*, § 603.

[3] Hill *v.* Western Union Telegraph Co., 20 S. E. Rep. 135.

[4] Daughtery *v.* American Union Telegraph Co., 75 Ala. 168; s. c. American Union Telegraph Co. *v.* Daughtery, 89 Ala. 191; Western Union Telegraph Co. *v.* Way, 83 Ala. 542; Western Union Telegraph Co. *v.* Hyer, 22 Fla. 637; Western Union Telegraph Co. *v.* Fatman, 73 Ga. 285; Western Union Telegraph Co. *v.* Reynolds, 77 Va. 173.

side is Daughtery *v.* American Union Telegraph Company.[1] In this case the message was in cipher, and did not disclose to the uninitiated what its meaning and import were, nor were they explained to the telegraph operator, and he was ignorant of the purport and object of the message; but it would have been understood and acted upon by the recipients had it been transmitted and delivered according to the usual course. Its true import was an instruction to the plaintiff's broker to sell in New York 300 bales of cotton previously purchased by the broker on account of the plaintiff, 100 bales to be delivered the same month, and the remaining 200 bales to be delivered in the following month, and if the message had been transmitted and delivered in due time the plaintiff alleged that the brokers would have made the sale and realized one hundred dollars' profit in the purchase and re-sale, but in consequence of the non-delivery of the message, the cotton was not sold but remained on hand until several days afterwards when the failure to transmit the message became known and another one was sent. But the price of cotton had materially fallen in the meantime, and the plaintiff lost $1000 upon the transaction. This was the sum which he claimed as damages. The court fully examines the authorities, and after criticising the rule as expressed in Hadley *v.* Baxendale, decides the case without specially stating what its reasons therefor were. It seems to have decided on general principles that the damages being the direct, natural, and proximate result of the negligence of the defendant company, it made no difference whether the company knew what the message meant or not.

§ 596. **Same Subject** (*continued*). — This case was considered and its principles stated and upheld in a later case in the same State.[2] The court in this case says that the court

[1] 75 Ala. 168; s. c. American Union Telegraph Co. *v.* Daughtery, 89 Ala. 191.

[2] Western Union Telegraph Co. *v.* Way, 83 Ala. 542.

in Daughtery's case does not condemn the rule of damages stated in Hadley *v.* Baxendale, but the mode of its statement, and accepts the principle of the rule itself, but limits the damages which may be recovered in the case of cipher messages to the direct, natural, and proximate results of the negligence, and does not include what the court calls "special consequences," which, it may be presumed, is a phrase equivalent in meaning to special damages or collateral or consequential damages. This explanation of the ruling in Daughtery's case, however, does not coincide with the interpretation of the rule in Hadley *v.* Baxendale in the English courts in Sanders *v.* Stuart,[1] for in the English case the court held that no damages more than nominal could be fairly and reasonably considered as arising naturally and according to the general course of things from the breach of contract to transmit a cipher message. In other words, the rule in Alabama is different from the English rule, and from the rule in the majority of the United States in this, that in case of cipher messages it allows the recovery of direct, natural, and proximate damages, but excludes collateral or special damages, whereas in England and in most of the United States,[2] the rule excludes natural and proximate damages as well as consequential or special damages in such cases. The rule in Daughtery's case, however, was reaffirmed in Alabama in the later stage of the same case when it came before the Supreme Court of that State a second time in American Union Telegraph Company *v.* Daughtery.[3] A strong dissenting opinion, however, was filed in this last case.

§ 597. **Florida Case.** — The rule in Alabama has been followed in Florida in a case which holds that full damages may be recovered even when the message was in cipher. The court in this case cites the rule in the Alabama cases,

[1] 1 Com. Pl. Div. 326.

[2] See cases *supra*, §§ 588–593.

[3] 89 Ala. 191.

but places its decision rather upon the ground of the advisability of compelling the telegraph companies to perform their public duties by rendering them liable for all damages resulting from failure to perform this duty, whether or not the telegraph company had any information as to the probable consequences of its negligence.[1] A strong dissenting opinion was filed in this case.

§ 598. **Western Union Telegraph Company v. Hyer.** — The facts were that suit was brought by Hyer Brothers against the Western Union Telegraph Company for damages for non-delivery of a cablegram sent to them at Pensacola by their correspondent and agent at Barbadoes. The evidence showed that the plaintiffs were merchants and ship brokers at Pensacola, and in September, 1883, they received a cipher cablegram from their Barbadoes agent. They answered this to their agent, and the agent in return answered their answer. This last answer was never delivered. The original cablegram contained information as to freights. The answer was an order to freight a vessel, and the second answer, which was never delivered, was information that the agent had chartered a vessel as per their order. Hyer Brothers, not receiving an answer to their despatch thought they could not get the vessel, and secured another. The original vessel arrived at Pensacola in October, and had to be re-chartered at a loss. The trial court instructed the jury to find their verdict as a special verdict upon which, if in favor of the plaintiff, it should enter judgment for nominal damages or for the amount of damages as found by the jury as it might thereafter be advised. The jury returned a verdict for the plaintiffs for $618.19, and the trial court, after being advised, entered judgment for that sum for the plaintiffs. The defendant took the case to the Supreme Court on error because the court below rendered judgment for more than nominal damages. The Supreme

[1] Western Union Telegraph Co. *v.* Hyer, 22 Fla. 637.

Court held that substantial damages could be recovered even though the message was in cipher, and held that as most messages are of a commercial or business nature which suggest value, the law would presume that the parties contemplated that the breach of the contract of transmission would involve actual damages, and that as the knowledge of the operator that the message was pecuniarily important could not affect his manner of action, or impose on him any additional obligation, the lack of such knowledge would not relieve the company from its obligation for actual damages.[1]

§ 599. **Georgia Case.** — The courts in Georgia have followed this same line of decision. This rule was announced in the case of Western Union Telegraph Company *v.* Fatman.[2] The message was in cipher, but it was held that this fact did not prevent the plaintiff from recovering his actual damages, providing they were the natural result of failure to transmit the message. The action was brought by a ship broker in Savannah against the Western Union Telegraph Company for unreasonable delay in delivering a cablegram whereby the broker was damaged the loss of his commissions from a contractor to take his ship, the time given the broker having expired, and his customer having taken another ship by reason of the delay of the company in delivering the cablegram. There was no question of any error in the message or delay in reaching Savannah, but the delay was after the message reached Savannah.[3] This case professes to follow the case of Western Union Telegraph Company *v.* Blanchard,[4] but the latter case was not a case of a cipher message, but one which was in technical language, being as follows, "Cover 200 September, 100 August."

[1] Western Union Telegraph Co. *v.* Hyer, 22 Fla. 637.
[2] 73 Ga. 285.
[3] Western Union Telegraph Co. *v.* Fatman, 73 Ga. 285.
[4] 68 Ga. 299.

§ 600. **Virginia Case.** — In a recent case in Virignia, the court held that full damages could be recovered even in the case of a cipher message, but this decision was based upon the statute of that State which states that any person injured by the telegraph company failing to comply with its statutory duties as to forwarding telegrams promptly, may recover such damages as he has suffered by such default, and that the effect of this statute was to render it immaterial whether the message was in cipher or not.[1] The message in this case consisted of the following, "N. A. R. R. E. N. D. A;" these being wholly unintelligible except to those having the key of the message, which gave it an intelligible meaning.

§ 601. **Fallacy of Decisions giving Damages.** — The fallacy in the decision of these cases allowing more than nominal damages seems to arise from a confusion as to what constitutes the negligent act which forms the basis of the action; for while a neglect to transmit properly an intelligible message, *e. g.*, one ordering the purchase or sale of goods, may directly and proximately cause a loss owing to the fluctuation of the market, the neglect to transmit an unintelligible message cannot directly affect any proceedings. Another step is necessary, namely, the translation of the unintelligible message; and this interposition of another step in the process renders the damages not the direct, natural, and proximate result of the failure in transmitting the message in question. For instance, the direct result of failing to transmit such a message as "Arch Barlier Henry Augusta"[2] could not be any financial loss. Such loss, if it occurs, must arise from some other form of words than the message in question. This confusion in the Alabama courts and others holding the same line has arisen from the courts looking at the real meaning of the message, or in other words, the translation of the message, and considering that

[1] Western Union Telegraph Co. *v.* Reynolds, 77 Va. 173.

[2] Candee *v.* Western Union Telegraph Co., 54 Wisc. 471.

as the message transmitted; which, if it had been the case, might, of course, directly and proximately have caused the damages in question.

§ 602. **Exemption as to Cipher Messages in Contract.** — Telegraph companies have inserted now in almost every case in the printed stipulations on their blank forms a provision which is, in substance, that the company "shall not be liable for errors in cipher or obscure messages." This stipulation has been before the Supreme Court of the United States in a recent case;[1] and the court held that such a stipulation is reasonable, since the operator reading a cipher message has not the assistance of the context in ascertaining particular words and that such a stipulation limits the damages for error or delay in transmission to nominal damages, since nothing more than this could reasonably be supposed to either flow naturally from the breach of the contract or to have been contemplated by the parties.

§ 603. **Primrose v. Western Union Telegraph Company.** — In this case the action was to recover damages for a negligent mistake of the defendant's agents in transmitting a telegram for the plaintiff at Philadelphia to his agent at Ellis, Kansas. The message was written on a printed blank of the company containing the usual stipulations as to repetition, and the heading called attention of the sender to these stipulations. The message was in cipher as follows: "Despot. Am exceedingly busy. Bay all kinds quo perhaps bracken half of it mince moment promptly of purchase. Frank J. Primrose." The message as delivered was "Destroy am exceeding busy buy all kinds quo perhaps bracken half of it mince moment promptly of purchase." The translation of this message as started was, "Yours of the 15th received. Am exceedingly busy. I have bought all kinds, five hundred thousand pounds. Perhaps we have sold half of it. Wire when you do anything. Send samples

[1] Primrose *v.* Western Union Telegraph Co., 154 U. S. 1.

immediately promptly of purchase." By the change in the message as delivered from "bay," which meant "I have bought," to "buy," which meant "buy," the agent was misled into buying large quantities of wool. The other errors were immaterial. The plaintiff suffered a loss of $20,000 in settling for these purchases with the seller. The plaintiff gave evidence at the trial that he wrote the message in his own office on one of a bunch of the defendant's blanks which he kept on hand; that he did not then read or remember ever having read the printed matter on the back; that he paid the usual rate for an unrepeated message. He also introduced evidence showing that the message was transmitted correctly as far as a repeating station in Kansas, and the error occurred there or at a later point. There was evidence as to the resemblance of the telegraphic symbols for "bay" and "buy," showing that they were very closely alike.

§ 604. **Opinion in Primrose v. Western Union Telegraph Company.** — Mr. Justice Gray, delivering the opinion of the court, held that the stipulation as to repetition did not wholly exempt the telegraph company from liability for negligence, but only required the sender to have it repeated, and to pay half as much again as the price, in order to hold the company liable for mistakes or delays in transmitting or delivering, or for not delivering a message, whether happening by the negligence of its servants or otherwise. He then says that the reasonableness and validity of such regulations have been upheld by the great preponderance of authority in this country, and discusses the leading cases holding that such stipulations are reasonable.[1] He then disposes of the

[1] Citing MacAndrew *v.* Electric Telegraph Co., 17 C. B. 3; Baxter *v.* Dominion Telegraph Co., 37 Up. Can. Q. B. 470; Camp *v.* Western Union Telegraph Co., 1 Metc. 164, 168; Birney *v.* New York & Washington Telegraph Co., 18 Md. 341; U. S. Telegraph Co. *v.* Gildersleve, 29 Md. 232, 246; Passmore *v.* Western Union Telegraph Co., 78 Pa. St. 238; Western Union Telegraph Co. *v.* Stevenson, 128 Pa. St. 442; Breese *v.* Western Union Telegraph Co., 48 N. Y. 132; Kiley *v.* Western Union

cases which hold the regulation to be void, saying that many were actions by addressees who had no notice of the regulations till after the receipt of the message, and could not therefore have agreed to them in advance,[1] and that others were night messages, in which the whole provision about repeating was omitted, and a sweeping and comprehensive provision substituted by the effect of which all liability beyond the price paid was avoided,[2] and says the only cases cited by the plaintiff where the stipulation is against public policy and void, independently of statute, are Tyler *v.* Western Union Telegraph Company,[3] Ayer *v.* Western Union Telegraph Company,[4] Telegraph Company *v.* Griswold,[5] Western Union Telegraph Company *v.* Crall,[6] Western Union Telegraph Company *v.* Howell,[7] and Dorgan *v.* Telegraph Company.[8] He examines the reasoning in Tyler *v.* Western Union Telegraph Company, and concludes that on principle and authority the stipulation binds the sender and becomes a part of the contract between him and the company. This must be considered as an authoritative decision in the court of last resort in the United States.

§ 605. **Limited Information.** — It is evident that a telegraphic message, while not strictly a cipher message, may give very limited information as to the nature of the transaction contemplated by the parties, as, for instance, a

Telegraph Co., 109 N. Y. 231; Ellis *v.* American Telegraph Co., 13 Allen, 226; Redpath *v.* Western Union Telegraph Co., 112 Mass. 71; Grinnell *v.* Western Union Telegraph Co., 113 Mass. 299; Clement *v.* Western Union Telegraph Co., 137 Mass. 463.

[1] Such as New York & Washington Print. Tel. Co. *v.* Dryburg, 35 Pa. St. 298; Harris *v.* Western Union Telegraph Co., 9 Phila. 88; De la Grange *v.* Southwestern Telegraph Co., 25 La. An. 383.

[2] True *v.* International Telegraph Co., 60 Me. 9, 18; Bartlett *v.* Western Union Telegraph Co., 62 Me. 209; Candee *v.* Western Union Telegraph Co., 34 Wis. 471; Hibbard *v.* Western Union Telegraph Co., 33 Wis. 558.

[3] 60 Ill. 421.

[4] 79 Me. 493.

[5] 37 Oh. St. 301.

[6] 38 Kan. 679.

[7] 38 Kan. 685.

[8] 1 Am. L. T. N. S. 406.

message, without being strictly in cipher, may contain so many technical phrases and abbreviations as to be practically unintelligible to a person not schooled in the business to which it relates. The question then arises how far the telegraph company shall be considered as having information which will render it liable for damages resulting from its negligence. There may be various degrees of information thus given. For instance, a telegram may be so concise as to contain simply an order to buy or sell goods, not giving any price or terms upon which the purchase or sale is to be made, or it may go fully into the details of the purchase. The degree of information, however, does not seem to be material in holding the telegraph company liable for direct damages, providing the court can say from the message that the telegraph company knew that a commercial transaction was intended.[1] If, however, the plaintiff intends to claim special damages, he must show that the company, either from the language of the message or from other sources, had sufficient information to reasonably contemplate the special damages claimed.

§ 606. **Instances of Limited Information.** — Thus in a case in Pennsylvania where direct damages were claimed, and the telegram was "Buy 50 Northwestern, 50 Prairie Du-Chien, limit 45," it was held that this message disclosed the commercial nature of the business to which it related, and that a loss would occur if it was delayed. In this case the damages claimed were held to be the direct, proximate, and natural results of the negligence of the defendant. It is evident that in this case the message itself conveyed to the telegraph company information that the transaction involved was a purchase of some kind of commodity, and that a change in the value of the goods, whereby the plaintiff might be obliged to pay more for them than he would have

[1] Western Union Telegraph Co. *v.* Williford, 2 Tex. Civ. App. 574; Western Union Telegraph Co. *v.* Lowrey, 32 Neb. 732.

if the telegram had been promptly delivered, might be a natural, direct, and proximate result of delay in transmitting the message.[1] Similarly in a case in Illinois where the despatches were, "Please buy 1000 August," and "Please buy in addition to 1000 August, 1000 cheapest month," the court held that although the messages gave no information as to the terms of the proposed purchase, yet they did clearly show that a purchase of property was contemplated, and therefore any change in the price occurring during a delay in executing the order caused by negligence of the company in transmitting the message, was the direct, natural, and proximate result of such negligence.[2]

§ 607. **Same Subject** (*continued*). — So in a case in Georgia the message delivered to the company was: —

"Waldron & Tainter, New York.

"Cover two hundred September, one hundred August.

"(Signed) Blanchard, Williams & Co."

The message as delivered by the company to the addressee was: —

"To Waldron & Tainter, New York.

"Cover two hundred September, two hundred August.

"Blanchard, Williams & Co."

Waldron & Tainter were commission agents for the plaintiff, and held a hundred bales of cotton for them for August delivery; and on account of the change in the above message, they sold two hundred bales August for the plaintiffs, compelling them to buy a hundred extra. It was shown in evidence that the error arose from the inattention and negligence of the telegraph operator, which he in his evidence called the operation of unconscious mental action. The

[1] United States Telegraph Co. *v.* Wenger, 55 Pa. St. 262; see also Telegraph Co. *v.* Griswold, 37 Oh. St. 301.

[2] Postal Telegraph Cable Co. *v.* Lathrop, 33 Ill. App. 400; s. c. affirmed, 131 Ill. 575; giving a full discussion of the cases. To the same effect, Western Union Telegraph Co. *v.* Harris, 19 Ill. App. 347.

court held that the message was not a cipher message, but an ordinary *commercial message*, intelligible to those engaged in cotton dealing, and that at least there was enough to show that it was a commercial message of value, and therefore the company was responsible for the damages *naturally resulting* therefrom.[1]

§ 608. **Abbreviations.** — Similarly the telegram may contain abbreviations of such a nature or so numerous as to render the telegram, in fact, unintelligible. In this case it resembles a cipher message except so far as the telegraph company may be presumed to have common knowledge of the meaning of the abbreviations like the public at large. For instance, in a case where the message in answer to an inquiry for market rates was as follows, "Corn cribs six sixty C. A. F. prompt," it was shown that the word "cribs" was a trade term and meant clear ribs, and that "C. A. F." meant "cost and freight," and that this meaning of the words was commonly known in the locality where the message was sent, and to the telegraph operators. The court held that this message gave sufficient information to the telegraph operator of its commercial importance, and therefore the company should be held liable for full damages resulting from its negligence in transmission.[2] The test in all these cases where the telegram is not in cipher, on the one hand, but on the other hand is unintelligible, is whether its language conveys information to the effect that it relates to a commercial transaction; for if it does, the telegraph company is thus put upon its guard that financial loss is likely to follow from delay or negligence in the transmission, and therefore is rendered liable for such damages.[3]

§ 609. **Sources of Information.** — The only source of infor-

[1] Western Union Telegraph Co. *v.* Blanchard, 68 Ga. 299.

[2] Pepper *v.* Western Union Telegraph Co., 87 Tenn. 554.

[3] Postal Telegraph Cable Co. *v.* Lathrop, 33 Ill. App. 400; Western Union Telegraph Co. *v.* Blanchard, 68 Ga. 299.

mation which a telegraph company ordinarily has as to the meaning of a message, and the transactions to which it refers, is the language of the message. When this is the case it is a question of law for the court, whether the language is sufficient to render the company liable for the damages claimed.[1]

§ 610. **Information from Sender of the Message.** — Information given to the telegraph operator by the sender at the time of sending the message renders the telegraph company affected with liability for damages naturally resulting from the facts thus communicated.[2]

§ 611. **Information from other Telegrams.** — Information may be acquired by the telegraph company from other telegrams sent or received about the same time, and by the same operator as the telegram in question.[3] Thus it has been held that an instruction that if the agent knew of the importance of the prompt delivery of the message, or could have discovered it from the terms of the telegram or from other telegrams in reference to the same matter, the telegraph company would be chargeable with knowledge of the fact, was a correct statement of the law.[4] In another case a dealer in cattle living in Iowa wired his Chicago correspondent, "Send me market Kansas City to-morrow and next day." He had previously sent and received a great many telegrams from that office, and it was held that it was a question for the jury whether the message charged the company with notice that the sender intended to act upon the information obtained from the answer in buying or selling cattle in Kansas City.[5]

[1] *Supra*, § 574.

[2] Western Union Telegraph Co. *v.* Haman, 2 Tex. Civ. App. 100; Western Union Telegraph Co. *v.* Valentine, 18 Ill. App. 57; Mackay *v.* Western Union Telegraph Co., 16 Nev. 222.

[3] Erie Telegraph & Telephone Co. *v.* Grimes, 82 Tex. 89.

[4] Erie Telegraph & Telephone Co. *v.* Grimes, 82 Tex. 89.

[5] Garrett *v.* Western Union Telegraph Co., 83 Iowa, 257.

§ 612. **Interpretation by Usage.** — It is also held that the usages of commerce may be employed to interpret the message when it relates to commercial subjects.[1] Thus where a telegraph message, when read in the light of careful usage in commercial correspondence, reasonably informs the operator that the message is one of business importance, and discloses the transaction as far as is necessary to accomplish the purpose for which it is sent, the telegraph company is liable for all direct damages from negligent failure to transmit and deliver it, as written, within a reasonable time.[2]

§ 613. **Knowledge of the Operator from General Sources.** — Knowledge gained by the telegraph operator from other sources may also affect the company with notice in case the message is negligently transmitted. This may be such knowledge as the operator gains locally from the natural course of things. For instance, where the message related to a threshing-machine, and one of the operators knew that the plaintiff owned the machine, and was operating it, it was held that the telegraph company was liable for loss of a contract in regard to the doing of work by the machine which was lost by delay in the delivery of the message.[3]

§ 614. **Classes of Damages.** — The various forms of damages which the plaintiff may claim are obviously innumerable. There are, however, certain kinds which from their frequent occurrence may be classified with more or less definiteness, and this classification may assist in the discussion of the subject. These classes are as follows: First, loss of debt by failure to attach or to take other legal proceedings. Second, incurring travelling expenses. Third, loss of offered employment. Fourth, loss on buying and selling goods. Fifth, loss of profits. Sixth, loss of money trans-

[1] Bierhaus *v.* Western Union Telegraph Co., 8 Ind. App. 246.

[2] Bierhaus *v.* Western Union Telegraph Co., *supra*.

[3] Western Union Telegraph Co. *v.* Bowen, 84 Tex. 476.

mitted by telegram. Seventh, mental sufferings and injury to the feelings.

615. **Loss of Debts.** — It is generally held that in cases where the message concerns the taking of some action to secure a debt due by a third party, either by attachment or levy of execution, or in other ways, and this purpose is apparent on the face of the message, the telegraph company must be held bound to know that if it delays action negligently, or transmits the message incorrectly, the result of so doing may be a loss of the security which is desired for the debt; and therefore the telegraph company is held bound to make good the loss of the debt if the debtor proves insolvent or absconds, or the debt is otherwise rendered uncollectable.[1] But the plaintiff must show clearly that if the telegram had been duly transmitted, the action desired would have been taken, and would have secured the debt.[2] Thus in a case in the Federal courts,[3] the facts were these: —

A telegraphic message instructing the levying of an attachment was delayed in transit, and in consequence other creditors obtained priority over the sender's attachment. The debtor's property was not sufficient to pay the amount of the debt of the first attaching creditor, but would have been sufficient to pay the debt due to the sender of the telegram if his attachment had obtained priority. The telegraph company was informed by the terms of the message of the danger of loss to the sender, and was expressly requested to

[1] Fleischner *v.* Pacific Postal Telegraph Cable Co., 55 Fed. Rep. 742; Bierhaus *v.* Western Union Telegraph Co., 8 Ind. App. 246; Parks *v.* Alta California Telegraph Co., 13 Cal. 423; Bryant *v.* American Telegraph Co., 1 Daly, N. Y. 575; Western Union Telegraph Co. *v.* Sheffield, 71 Tex. 570; Martin *v.* Western Union Telegraph Co., 1 Tex. Civ. App. 143.

[2] Cases *supra*, Hartstein *v.* Western Union Telegraph Co., 62 N. W. Rep. 412; Manier *v.* Western Union Telegraph Co., 94 Tenn. 412.

[3] Fleischner *v.* Pacific Postal Telegraph Cable Co., C. C. 55 Fed. Rep. 738; Pacific Postal Tel. Cable Co. *v.* Fleischner, 66 Fed. Rep. 899.

transmit the message immediately. It was held that in an action against the telegraph company for damages, the measure of damages was the amount of the sender's debt. In another case[1] the message was "Due 1800. Attach if you can find property. Will send note by to-morrow's stage." This message was addressed to the plaintiff's agent, but was unreasonably delayed, whereby the plaintiff lost the debt. The court held that the loss of the debt was the natural and proximate damages resulting from the delay in transmission. So again where the message directed the attaching of a debtor's house and land and by delay this was not done until after the debtor had gone into insolvency and the debt was lost, except a small dividend, the court held that the measure of damages was the amount of debt and interest from the day of delivery less what the plaintiff had received on account of the debt.[2] In another case,[3] an attorney wired wholesale dealers: "Have you claim against P. L. D.? Answer how much." The latter replied, "Yes; $161.15." This answer was delayed, and in the meantime the debtor converted his property into money and fled to parts unknown. It was held that the telegraph company was liable to the dealers for failure to deliver the message within a reasonable time, though it was not informed of its importance otherwise than by its language. So in another case,[4] the plaintiff sued the defendant telegraph company for delay in delivering a message: "M. & Co. hold note of W. Will be attached to-night. Your bank telegraphed M. Bros., Bankers, to make bond," whereby the debt was lost. The court held that the message was sufficient on its face to show that its prompt delivery was necessary to avert loss.[5]

[1] Parks *v.* Alta Cal. Telegraph Co., 13 Cal. 422.
[2] Bryant *v.* American Telegraph Co., 1 Daly, N. Y. 575.
[3] Bierhaus *v.* Western Union Telegraph Co., 8 Ind. App. 246.
[4] Martin *v.* Western Union Telegraph Co., 1 Tex. Civ. App. 143.
[5] Cf. Western Union Telegraph Co. *v.* Sheffield, 71 Tex. 570.

On the other hand, in another case,[1] the facts were that C. left a despatch at defendant's telegraph office in S., to be forwarded to plaintiff at M. The despatch was: "Strauss gone to Howard. Gave man gold watch by mistake. Left no word with me. Store closed. Answer." Strauss was a clerk, whom plaintiff had left in charge of his jewelry store in his absence, and who during the night or early in the morning before the despatch was sent had robbed the store, and absconded with the property; and the despatch was in relation to the absconding, but defendant's agent had no knowledge thereof. The despatch remained in the telegraph office one hour and a half, and was then forwarded to the M. office, where it remained two hours before it was delivered, or any effort made to deliver it. It was held that plaintiff could not recover more than the cost of the message and incidental expenses.

§ 616. **Incurring Travelling Expenses.** — When the telegram relates to the travelling of the plaintiff or his agents, the telegraph company is held bound to know that if the telegram is not transmitted correctly or promptly, its negligence in this respect may result in the plaintiff's being obliged to incur expenses of travel and board and similar expenses, which he would not otherwise have been obliged to incur, and therefore he may recover his reasonable travelling and living expenses incurred through such negligence of the telegraph company in this respect, and compensation for the time lost.[2]

§ 617. **Instances of recovering Travelling Expenses** — Thus in a case in Texas,[3] the facts were that plaintiff delivered a

[1] Western Union Telegraph Co. *v.* Cornwell, 2 Colo. App. 491.

[2] Western Union Telegraph Co. *v.* Shumate, 2 Tex. Civ. App. 429; Western Union Telegraph Co. *v.* Short, 53 Ark. 434; Bliss *v.* Baltimore, etc., Telegraph Co., 30 Mo. App. 103; Sprague *v.* Western Union Telegraph Co., 6 Daly, N. Y. 200.

[3] Western Union Telegraph Co. *v.* Shumate, 2 Tex. Civ. App. 429.

message to defendant telegraph company at G., Texas, addressed to his agent in O., Cal., as follows: "Close the trade. I will come soon;" and on his arrival at O., discovered that the message had not been delivered, and that the deal had failed, thus requiring him to return to G. It was held that plaintiff's expenses to and from California were proper items of damage against the defendant, but not the losses resulting from the sale of his property at a sacrifice before starting. In a case in Arkansas,[1] the facts were that a message to plaintiff was delivered to defendant telegraph company reciting that a certain case was set for August 17th. As delivered to plaintiff, the message read August 7th. It was held that defendant was liable for plaintiff's reasonable expenses in going to and from the place of trial, and the value of his time; but that, there being no evidence that the company had notice of special circumstances connected with the sending of the message, it was not liable for loss to the plaintiff resulting from the necessity of shutting down his mill, idleness of his teams, etc., during his absence.

§ 618. **Same Subject** (*continued*). — In a case in Missouri,[2] the plaintiff being in St. Louis, telegraphed to one Fairchild, who was in Chicago, arranging for a conference with him about railroad matters. The telegram was not delivered to Fairchild, who left in the course of a day or two for Boston. The plaintiff, in the meantime, not hearing from him, had started from St. Louis and gone to Chicago. Failing to see Fairchild, he returned to St. Louis and brought suit for his expenses. The negligence of the defendant was admitted, and the only question was one of damages, and it was held that the expenses of the travel were not speculative damages, but actual damages for which the plaintiff could recover.

[1] Western Union Telegraph Co. *v.* Short, 53 Ark. 434.

[2] Bliss *v.* Baltimore & Ohio Telegraph Co., 30 Mo. App. 103.

So in a case in New York,[1] a person having a case coming on in a different city, telegraphed to his attorney to have it postponed, if possible, and to reply. No reply coming, the plaintiff supposed that postponement was not possible, and went to the city of trial with his attorney. He found when he got there that the case had been postponed. The court held that as this message was never sent, the conditions in the blank as to repeating did not apply. That, not receiving any answer, the plaintiff was justified in supposing that postponement was impossible, and he was allowed to recover all the expenses of the journey rendered necessary by the negligence of the defendant.

§ 619. **Loss of Offered Employment.** — When parties have been negotiating for the employment of one by the other, and the offer of the employee to the employer is made by a telegram requiring an answer, and the employer telegraphs back an acceptance of the offer, or vice versa, the terms being definite and fixed, as, for instance, of a salary for a year, and by reason of delay in transmission of this acceptance the employee loses his employment or accepts other less lucrative employment, he can recover as his damages the difference between the salary which he would have received had the acceptance been duly transmitted by the telegraph company, and what he has been able to earn during the period covered by the contract or up to the date of bringing suit. He cannot, however, lie idle, but must make reasonably diligent efforts to secure employment during the period covered by the contract.[2] But if the length of employment or other terms are indefinite, the plaintiff cannot recover.[3] If the telegram is simply an inquiry as to whether a person

[1] Sprague *v.* Western Union Telegraph Co., 6 Daly, N. Y. 200.

[2] Western Union Telegraph Co. *v.* Valentine, 18 Ill. App. 57; Baldwin *v.* Western Union Telegraph Co., 21 S. E. Rep. 212.

[3] Kenyon *v.* Western Union Telegraph Co., 100 Cal. 454; and see *supra*, § 570.

will accept employment on certain terms, the person to whom it is addressed cannot recover damages for its slow or erroneous transmission, because of the uncertainty as to whether the employment would have been given to him.[1] So a telegram merely arranging for a meeting of parties with a view to employment is too indefinite, for no employment might be agreed upon. Thus in a case in Georgia, the action was by an undertaker for loss of a job by negligent delivery of a telegram.

"Bullard. Ga., Jan. 8, 1885.

"To J. J. Clay, — Meet us at E. T. Depot on this evening's train prepared to arrange for shipment to Indianapolis my mother-in-law's remains.

"D. G. Hughs."

The court held that there was nothing to show that Clay was damaged, as it only appeared that he had lost a mere opportunity or possibility to make something, and that for this mere possibility he had no right of recovery.[2] In a case in Mississippi,[3] it was held that the delay of a telegraph company in delivering a telegram to an attorney, requesting him to take the first train for a neighboring town, but which telegram contained nothing to show why he was wanted at that place, or what injuries would result to him from the delay in delivery, would not enable him to recover the attorney's fees which he might have earned had the despatch been seasonably delivered, as such rule of damages would cover all remote and improbable consequences arising from the delay in delivering, instead of the probable consequences only.

§ 620. **Loss on buying and selling Goods.** — In arriving at a rule for the measure of damages in cases where the plaintiff alleges a loss in buying and selling goods, by reason of the

[1] Walser *v.* Western Union Telegraph Co., 114 N. C. 440.

[2] Clay *v.* Western Union Telegraph Co., 81 Ga. 285.

[3] Western Union Telegraph Co. *v.* Clifton, 68 Miss. 307.

negligence of the telegraph company, the main question is whether, in fact, any actual damage has been suffered. If the plaintiff merely complains of purchases or sales he might have made had the telegram been properly sent, other circumstances may decide his recovery.[1] But if he has actually bought or sold, and in so doing was damaged by the negligent act of the telegraph company, he will ordinarily be allowed to recover his damages.[2] This general principle will be illustrated by the subjoined cases.

§ 621. **Actual Loss in Purchase or Sale.** — When a party has goods for sale, and his agent in a distant place sends him a telegram to ship the goods at once, this being done for the purpose of sale, and the telegram is delayed, and the market for the goods falls between the time when the goods would have reached the market if the telegram had been delivered with promptness, and the time when the goods in fact reached the market and were sold after the actual receipt of the message, the measure of damages is the difference between the market price on these two dates, for this measures the exact injury which the plaintiff has suffered.[3] So where the telegram is an order to buy a quantity of goods, and by mistake it is transmitted as an order to buy a smaller quantity, the measure of damages is the difference in price between the price of the deficiency at the time the telegram was received and the time when the error was discovered.[4]

§ 622. **Same Subject** (*continued*). — If a telegram is a mere order to an agent to buy at the market price, and no purchase is made because of delay in receiving the telegram,

[1] Western Union Telegraph Co. *v.* Hall, 124 U. S. 444, 454; Levy *v.* Western Union Telegraph Co., 35 Mo. App. 170.

[2] Marr *v.* Western Union Telegraph Co., 85 Tenn. 529.

[3] Manville *v.* Western Union Telegraph Co., 37 Ia. 214. Cf. Thompson *v.* Western Union Telegraph Co., 64 Wisc. 531. Cf. Western Union Telegraph Co. *v.* Robinson, 29 S. W. Rep. 71.

[4] Marr *v.* Western Union Telegraph Co., 85 Tenn. 529.

there is no damage, for expected profits from a re-sale are not allowed.[1] But if the purchase is made, but at a later time than it would have been, the measure of damages is the difference between the market price at the date of purchase, and when it would have been made had the telegram been promptly delivered.[2] When the message sent over the lines is an offer to sell, and the price as transmitted is less than that stated in the original message, and is accepted, the sender of the message is in some States held bound by it, as he selected the telegraph as his agency for transmitting the offer, and he is therefore damaged just the difference between the two prices, and can recover that difference from the company.[3]

§ 623. **Goods ordered sent to Wrong Place.** — When a person orders goods by telegraph, and by error of the telegraph company the address of the telegram is changed, and consequently the goods are sent to the wrong place, the measure of damages is the value of the goods at the place to which they should have been sent, less the value at the place to which they were sent, if the plaintiff has, in fact, obtained his property.[4] In a case in Texas,[5] it was held that where a telegraph company, by negligently failing to deliver a telegram, caused the sender's cattle to be shipped to a point where they had to be sold at less than the market price at the place whence they were shipped, the measure of damages

[1] Hibbard *v.* Western Union Telegraph Co., 33 Wisc. 558; Western Union Telegraph Co. *v.* Hall, 124 U. S. 456.

[2] Western Union Telegraph Co. *v.* Hall, 124 U. S. 456; United States Telegraph Co. *v.* Wenger, 55 Pa. St. 262; Squire *v.* Western Union Telegraph Co., 98 Mass. 232; True *v.* International Telegraph Co., 60 Me. 9; Pearsall *v.* Western Union Telegraph Co., 124 N. Y. 267. Cf. *supra*, § 576.

[3] Ayer *v.* Western Union Telegraph Co., 79 Me. 493; but see *post*, §§ 684–688.

[4] Western Union Telegraph Co. *v.* Reid, 83 Ga. 401.

[5] Western Union Telegraph Co. *v.* Stevens, Tex. Sup. 16 S. W. Rep. 1095.

was the difference between such market price and the amount for which they were sold. So it has been held,[1] that where a message relates to the sale and delivery of cattle owned by plaintiff, the contract for which sale was made by the sender on plaintiff's behalf, the measure of damages for failure to deliver the message is the difference between the market value where the cattle were at the time and the contract price at the place of delivery, less the cost of transportation to the latter place.

§ 624. **Furnishing Market Reports.** — When the telegraph company agrees to furnish market reports to a customer it in fact agrees to furnish true reports, and if it furnishes incorrect information on these points, the measure of damages of the person who makes a purchase acting upon the faith of this information is the difference between the price which he paid and the market price at that time. That is to say, if the person receiving the incorrect quotation of prices, as a result thereof orders a quantity of goods, and is obliged to pay therefor a higher price than that quoted to him, he can recover the difference between the amount he paid and the amount which the market report sent to him by the telegraph company indicated that he would have to pay.[2] In the case of Turner *v.* Hawkeye Telegraph Company,[3] the defendant company agreed to furnish the plaintiff company with daily quotations as to the price of grain in Chicago. Upon a day in August it sent him an incorrect quotation, and he, being short of wheat, the incorrect quotation being much lower than the market, he ordered the purchase of a large quantity of wheat through his brokers. The wheat was purchased, and the error was then discovered. Subsequently wheat went down below the point quoted incor-

[1] Western Union Telegraph Co. *v.* Williford, 2 Tex. Civ. App. 574.

[2] Turner *v.* Hawkeye Telegraph Co., 41 Ia. 458; Bank of New Orleans *v.* Western Union Telegraph Co., 27 La. An., 49. Cf. *supra*, § 292 *et seq.*

[3] 41 Ia. 458.

rectly in the telegram. Plaintiff brought suit for his damages, and the court held that in this case the proof that the message contained an incorrect quotation was of itself proof of negligence, and did not require the plaintiff to investigate further and show how the error occurred, or rather that this was a case where the question of negligence does not come in, being simply a breach of contract to forward correct reports. It was held that the measure of damages was the difference between what he paid for the wheat, *i. e.*, the market price, and what the price telegraphed him was, and that the fact that the grain reports were of Chicago prices notified the telegraph company that he was likely to deal there.[1]

§ 625. **Delayed Telegram, Loss of Contract.** — When the telegram which has been negligently delayed in transmission is the acceptance by the plaintiff of an offer for the sale of goods to him, and by reason of the negligence he loses the contract, his damages are the difference between the contract price and the market price at the place where the offer was made.[2] So where the injury to one to whom the telegram was sent, by failure to deliver it, was the prevention of a sale that would otherwise have been consummated, the measure of damages is the price which would have been realized by the sale less the market value of the goods on that day, or if they had no market value, the contract price

[1] It has been said that the measure of damages for a mistake in a telegram giving the wrong market price is difference between the quoted price and the actual price, if the receiver's damages amount to as much. Hollis *v.* Western Union Telegraph Co., 91 Ga. 801; and that if a person who receives a telegram which quotes a wrongful price of stock, sells his stock, and gets the market value therefor, in the absence of evidence that the market value is less than the real value, he cannot recover damages. Hughes *v.* Western Union Telegraph Co., 114 N. C. 70.

[2] Squire *v.* Western Union Telegraph Co., 98 Mass. 232; True *v.* International Telegraph Co., 60 Me. 9; Cannon *v.* Western Union Telegraph Co., 100 N. C. 300. Compare *supra*, § 619.

less the price that could have been obtained afterwards.[1] So when the message was an acceptance of an offer to sell a lot of land at a certain price, and the message was delayed, and before its delivery the lot was sold, the court held that the damages were sufficiently distinct and certain to be recovered, and that the measure is the difference between the price offered and the price when the telegram was delivered.[2]

§ 626. **No Loss if not definite.** — But if there is no definite offer made to the plaintiff, but a mere quotation of prices, no distinct quantity being mentioned, and the plaintiff's telegram itself is in reality a mere offer to take a certain quantity at the price quoted, there is no loss of contract by the negligence of the telegraph company, and only nominal damages can be recovered.[3] Thus where there was a message asking the price of pork, and answer giving price, and a message accepting this offer, which message was not sent, and there was a verdict for plaintiff of twenty-five cents, the price of transmission, the court justified this by saying that the plaintiff had no contract with the sendee for pork, and the damages were too uncertain.[4]

§ 627. **Instances of Speculative Loss.** — In an action against a telegraph company for failure to deliver a message

Western Union Telegraph Co. *v.* James, 90 Ga. 254. Cf. Western Union Telegraph Co. *v.* Brown, 84 Tex. 54.

[2] The Court says: "It seems like attempting to cut the throat of common sense and knock the brains out of reason, to maintain the proposition that a man sustains no loss or injury cognizable by the law, when he is offered property for $3000 worth $5000 in the market, and which he is ready and anxious to buy, but is prevented from doing so, by negligence, such as is disclosed in the record and not denied or avoided by any excuse or justification." Alexander *v.* Western Union Telegraph Co., 66 Miss. 161; affirmed Alexander *v.* Western Union Telegraph Co., 67 Miss. 386.

[3] Beaupre *v.* Pacific & Atlantic Telegraph Co., 21 Minn. 155; Meggett *v.* Western Union Telegraph Co., 69 Miss. 198; Kinghorne *v.* Montreal Telegraph Co., 18 Up. Can. Q. B. 60.

[4] Beaupre *v.* Pacific & Atlantic Telegraph Co., 21 Minn. 155.

instructing the addressee as follows, "Buy me 100 Burlington & Quincy common stock, and 10,000 Santa Fe incomes," the mere facts that a few days after the message was sent the price of the above-named stock advanced, and so continued until suit was brought, does not entitle plaintiff to recover more than nominal damages, if there was no evidence that, if the stock had been purchased, the plaintiff would have ever sold it at a profit.[1] So where a telegraph message was, "Sell 200 sh. Tenn. Coal & Iron," and the defendant company failed to deliver the same for several days after it should have been delivered, and the plaintiff, the sender, did not in fact own any stock in said company, and no transaction was made, he is not entitled to recover the difference between the market value of said stock on the day when the telegram should have been delivered and the day when it was actually delivered.[2]

§ 628. **Profits of a Business.** — The rule that the damages claimed must be certain prevents the recovery of possible profits (*i. e.*, the profits which it is hoped will be obtained) from carrying on a business or making sales of goods. The damages are disallowed in such a case because they are in their nature uncertain and contingent, and the rule excludes all remote, speculative, and uncertain results, as well as possible profits, advantages, and other like consequences which might have arisen, or which it can be shown would have arisen from the performance of the contract.[3] Thus, for instance, where a telegram requesting boiler-makers to send a man to repair the boilers in a distillery was not delivered, it was held that the owners of the distillery might recover damages caused by the idleness of their employees and

[1] Western Union Telegraph Co. *v.* Fellner, 58 Ark. 29.

[2] Cahn *v.* Western Union Telegraph Co., 46 Fed. Rep. 40. Cf. Levy *v.* Western Union Telegraph Co., 35 Mo. App. 170.

[3] True *v.* International Telegraph Co., 60 Me. 9, 25; Squire *v.* Western Union Telegraph Co., 98 Mass. 232; Leonard *v.* New York, Albany & Buffalo El. Mag. Telegraph Co., 41 N. Y. 565.

teams, but could not recover probable profits on liquors that could have been made had no delay occurred.[1] So it has been held that where the telegram referred to a horse, the owner could not recover prize purses which the horse might have won.[2]

§ 629. **Profits of Resale of Goods.** — Expected profits on the resale of merchandise ordered by telegraph cannot be computed as a part of the damages of the plaintiff. The courts base this view upon the rule relating to the measure of damages as between a vendor and a purchaser, that rule being that if the vendor fails to deliver the goods purchased, the purchaser cannot recover against him what he could have sold the goods for if they had been delivered, but merely the difference between the contract price of the goods and the market price at the time delivery should have been made.[3] The courts extend the same principle to telegraph messages, and say that when the telegram orders the purchase of articles and is never delivered, the measure of damages can have no relation to the profit which might have been made by the sender of the telegram if the articles had been purchased and afterwards resold by him, and the plaintiff can only recover nominal damages since he has suffered no injury for which the law will allow him to recover substantial damages.[4] Where the delay in the delivery of a telegram broke up the negotiations for a sale, the court allowed the plaintiff to recover the difference between the contract price and the market price of the goods.[5]

[1] Rich Grain Distilling Co. *v.* Western Union Telegraph Co., 13 Ky. L. R. 256; to the same effect, Western Union Telegraph Co. *v.* Carroll, 84 Ga. 597.

[2] Western Union Telegraph Co. *v.* Crall, 39 Kan. 580. See also Kiley *v.* Western Union Telegraph Co., 39 Hun, 158; Hibbard *v.* Western Union Telegraph Co., 33 Wisc. 558; Cahn *v.* Western Union Telegraph Co., 1 C. C. A. 107.

[3] Williams *v* Reynolds, 18 Eng. Com. L. 493.

[4] Western Union Telegraph Co. *v.* Hall, 124 U. S. 454; Hibbard *v.* Western Union Telegraph Co., 33 Wisc. 558.

[5] Western Union Telegraph Co. *v.* James, 90 Ga. 254.

§ 630. **Profits when included in Damages.** — It is, however, well settled that in cases where specific profits are directly included in the damages which the plaintiff has suffered, he may recover them.[1] Thus if a person sends a telegram which is an acceptance of an offer to sell goods, and by delay in the transmission of the message the party having the goods sells to another, and the plaintiff is obliged to go into the market and buy the goods at a higher price, he may recover the difference between the contract price and the market price, even though this difference includes a profit from the rise of the goods in the market.[2]

§ 631. **Transmission of Money by Telegram.** — Telegraph companies, in some cases, undertake to transfer money by telegraphic despatch from one place to another. In such a case they are under their usual obligation to use diligence in the transmission, but come also under an absolute obligation to the person sending the money for the amount if it is not delivered. They are bound in such a case to see that the money is delivered at the place requested by the sender, but if the delivery is not made and the money is paid back to the sender, and he has not been damaged by the failure to make payment, there are no substantial damages for which the telegraph company is responsible. This point was decided in a recent case in Pennsylvania,[3] where the money was forwarded to pay a note of the sender. The money not arriving, the note was protested, but as it was taken up by him on the next day, and there was no proof of his credit having been injured by the protest, or that it was known to any persons outside of the bank and himself, it

[1] Western Union Telegraph Co. *v.* Hall, 124 U. S. 454; Squire *v.* Western Union Telegraph Co., 98 Mass. 232; Griffin *v.* Colver, 16 N. Y. 489; True *v.* International Telegraph Co., 60 Me. 9; Leonard *v.* New York, Albany & Buffalo El. Mag. Telegraph Co., 41 N. Y. 565.

[2] Squire *v.* Western Union Telegraph Co., 98 Mass. 232.

[3] Smith *v.* Western Union Telegraph Co., 150 Pa. St. 561.

was held that the telegraph company was not responsible since no damages had, in fact, been suffered.

§ 632. **Identification of Payee.** — What responsibility a telegraph company undertakes in such a case as to the identification of the person to whom the money is to be delivered, has been differently decided in different cases. The better rule seems to be that a telegraph company which accepts money for delivery to a person named, should get reasonable identification from him before delivery, and that if through failure to exercise such care in identifying the person to whom the money is sent, an impostor gets it, the telegraph company will be liable.[1]

§ 633. **Mental Sufferings.** — There is a well-settled principle of the law that damages cannot be recovered for mental sufferings and injury to the feelings alone, when no other species of damages is proved.[2] Thus it has been held that in an action of contract, if the only damage the plaintiff proves is grief, mortification, and similar feelings at the breach of the contract by the other party, he can only recover nominal damages.[3] So in actions of tort for negligent injury, it is held that damages to the feelings only, or mental distress, or fright or anxiety alone, will not maintain the action.[4] In suits against telegraph companies, however, the courts have not, in all States, adhered strictly to this rule, as will be seen hereafter, but have sometimes granted damages for injury to the feelings in cases where no other legal damages have been proved. Considering these damages, first, in relation to actions by the sender, and

[1] *Supra*, §§ 423–428; and see Western Union Telegraph Co. *v.* Brown, 58 Tex. 172; Lowery *v.* Western Union Telegraph Co., 60 N. Y. 198.

[2] Canning *v.* Williamstown, 1 Cush. 452; Wilcox *v.* R. R. Co., 52 Fed. Rep. 264; Masters *v.* Warren, 27 Conn. 293; Stewart *v.* Ripon, 38 Wisc. 584.

[3] Wilcox *v.* R. R. Co., 52 Fed. Rep. 264; Trigg *v.* Railway Co., 74 Mo. 147; Newman *v.* Western Union Telegraph Co., 54 Mo. App. 434.

[4] Canning *v.* Williamstown, 1 Cush. 452.

second, in relation to actions by the person to whom the message is sent, the rules established by the courts are as follows: —

§ 634. **Actions by Sender.** — There are comparatively few instances where actions have been brought by the sender of a telegram for injury to the feelings only. In one State, Indiana, several of these actions have been brought, alleging only damages to the feelings, and the courts have sustained the actions, partly because, in the opinion of the court, mental damages are "actual damages," so as to be included in the statute of that State allowing the sender to recover his "actual" damages in case of negligence of the telegraph company; and partly on grounds of public policy, because so many messages on the telegraph lines relate to matters involving the deepest and strongest human feelings, that it would be injurious to the common welfare to allow telegraph companies to escape all liability for negligence in transmitting such messages.[1] The court lays stress also on the fact that the language of the message in these cases puts the telegraph company on its guard, that the utmost diligence and promptness are necessary in transmission and delivery. The later decisions in Indiana, however, show a tendency to restrict this operation of the rule more closely than the earlier cases.[2] Thus in an action by the sender of a message against a telegraph company for failure to deliver the message to plaintiff's daughter announcing the death of her brother, injury to plaintiff's feelings, and anxiety and distress of mind, caused by the daughter's absence at such a time, through the failure to deliver the message, were held to be proper elements of damage, but his distress or anxiety resulting from sympathy with the sorrow of his wife or other

[1] Reese *v.* Western Union Telegraph Co., 123 Ind. 294; Western Union Telegraph Co. *v.* Newhouse, 6 Ind. App. 422; Western Union Telegraph Co. *v.* Stratemeier, 6 Ind. App. 125.

[2] Western Union Telegraph Co. *v.* Stratemeier, 6 Ind. App. 125.

persons of his family at the same absence, was held to be too remote.[1]

§ 635. **Same Subject** (*continued*). — The courts in North Carolina have followed these decisions in so far as holding that damages for mental anguish alone may be recovered. Thus in a case where the facts were that the action was for failure to deliver a message, and the complaint showed that the telegram was sent by the plaintiff's sister, who was left in charge of his house, and its cost was prepaid out of the plaintiff's funds, and that it was directed to his father, at whose house plaintiff was stopping, the message being "Tell Henry to come home. Lou is bad sick," the court sustained the action, saying that the plaintiff was able to sue on either of two grounds, first, that the sender was his agent; or second, that the message was for his use and benefit, and that he might recover damages for his mental anguish and suffering.[2] The courts of Illinois have not decided this particular question, but have held on demurrer that failure to deliver a telegram sent by a father to a son, summoning him to the deathbed of his mother, whereby the father did not have the comfort and fellowship of his son, entitles the plaintiff, the father, to at least the price of the telegram.[3]

§ 636. **Same Subject** (*continued*). — In Kansas there has been a direct decision that such damages cannot be recovered. In this case the action was by the person to whom the message was sent, but he declared as principal, the sender being in fact his agent. The message was from a son to his father announcing the death of an uncle. "Uncle Sam died last night. Funeral Wednesday." The message was negligently transmitted, and the plaintiff brought suit, alleging mental distress only as damages. He showed that he had paid back to his son the price of sending the message, and had ratified

[1] Western Union Telegraph Co. *v.* Stratemeier, 6 Ind. App. 125.
[2] Sherrill *v.* Western Union Telegraph Co., 109 N. C. 527.
[3] Logan *v.* Western Union Telegraph Co., 84 Ill. 468. Cf. § 643.

the agency. The court held that mental distress alone did not constitute legal damages except as part of physical pain, but that if the negligence was so gross as to be equal to malicious or wanton purpose, exemplary damages might be given.[1]

§ 637. **Mental Distress as Aggravation.** — In such actions, however, if the plaintiff shows actual legal damages, either the right to recover the price of the message, or other damages, it is held that he may recover as aggravation damages for the injury to his feelings.[2] Thus, for instance, where the message was to a doctor, and said, "Come first train to see my wife. Very low," and in consequence of the negligent delivery of the message the doctor did not come, and the wife died, it was held that, this substantial loss to the plaintiff being shown, he was entitled also to recover damages for his distress and mental anxiety caused by the delay of the message.[3]

§ 638. **Texas Cases.** — The state in which actions have been most frequently brought by the sender of the message to recover damages to his feelings is the state of Texas. In this state, from the earliest cases, such damages have been allowed, the court settling the question of whether such damages might be recovered when they were the only damages claimed, by holding that the action being in contract, the plaintiff is entitled on proof of breach to recover at least the price of sending the message or nominal damages, and thus bringing the case within the principle that when any pecuniary damages, however slight, can be proved, damages for mental suffering may be claimed in addition.[4] On this same principle it has been held that

[1] West *v.* Western Union Telegraph Co., 39 Kan. 93. Compare, on subject of right to sue, *supra*, §§ 454–456. See *post*, § 645.

[2] Western Union Telegraph Co. *v.* Henderson, 89 Ala. 510; Western Union Telegraph Co. *v.* Wilson, 93 Ala. 32.

[3] Western Union Telegraph Co. *v.* Henderson, 89 Ala. 510. Cf. Western Union Telegraph Co. *v.* Wilson, 93 Ala. 32.

[4] See *post*, §§ 643, 653, and cases there cited.

where the action was brought by a husband for injury to the wife caused by delay in the transmission of a message summoning a doctor, the husband in the right of the wife might recover for the prolonged suffering of the latter caused by the absence of the doctor, and in addition to this physical injury could recover damages for her mental suffering for the same reason.[1]

§ 639. **Texas Cases** (*continued*). — In another case, the plaintiff's wife having died, he telegraphed to her brother, "Mrs. B. is dead. Will bring corpse on train to-night." Owing to a delay caused by the fact that an intermediate office was closed at the time in the evening when the message came to it, the message was not delivered in time to be of any efficacy. The court held that the plaintiff might recover not only the price of the message, but also for his mental distress arising from the delay.[2] In another case,[3] the facts were as follows: The plaintiff was with her sick husband in Los Angeles; he died, and she telegraphed to her agent to send her $200, meaning to use the money in transporting the corpse home. In transmitting the despatch the place from which it was sent was changed from Los Angeles to San Francisco. Her agent accordingly telegraphed $200 to San Francisco. She, not receiving the money, waited and telegraphed again, and her agent, then finding out the mistake, sent the money to Los Angeles. She sued, and it was held that the negligence of the telegraph company having caused the money to be sent to San Francisco, she could recover not only the $200, but large damages for her mental grief and distress at being obliged to wait for the interment of her husband. This damage was held to be the natural and proximate result of the negligence, and that the telegraph company was informed of the probability of such a result.

[1] Western Union Telegraph Co. *v.* Cooper, 71 Tex. 507.
[2] Western Union Telegraph Co. *v.* Broesche, 72 Tex. 654.
[3] Western Union Telegraph Co. *v.* Simpson, 73 Tex. 422.

§ 640. **Texas Cases** (*continued*). — In another case the court applied a rule which obtained at one time in Texas, and which is discussed at length in cases below relating to actions by the addressee for damages,[1] namely, that the message must show the relationship of the parties in order to make the telegraph company liable. The message in this case was, "Come on first train. Bring Ferdinand. His father is very low." The court held that the language of this message was not sufficient to give notice to, or put the telegraph company upon inquiry as to the relationship of the parties, and therefore the plaintiff could not recover.[2] In another case the plaintiff sued for the loss of his wife. He had recently removed with her, she being in ill health, from the place where they had been living, and at the time of the removal had obtained a promise from her doctor that he would come to see her on receipt of a telegram saying that she was worse. She becoming worse, her husband telegraphed for the doctor, but the message was never delivered. The court held that there was no evidence to show that the doctor's coming would have benefited her, and therefore the plaintiff could not recover damages for her loss, and that being the case, *a fortiori*, could not recover damages for the mental suffering and anguish occasioned by her loss.[3]

§ 641. **Texas Cases** (*continued*). — In another case,[4] the court defeated the plaintiff's action on the ground that the facts showed that, had the message been delivered promptly, he would have suffered the same injury to his feelings as actually occurred, and the real cause of these damages was the action of third parties. In several other cases,[5] where

[1] *Post*, §§ 658–660.

[2] Western Union Telegraph Co. *v.* Kirkpatrick, 76 Tex. 217.

[3] Western Union Telegraph Co. *v.* Kendzora, 77 Tex. 257.

[4] Western Union Telegraph Co. *v.* Andrews, 78 Tex. 305.

[5] Gulf, Colorado & Santa Fe Telegraph Co. *v.* Richardson, 79 Tex. 649; Western Union Telegraph Co. *v.* Hoffman, 80 Tex. 420; Western Union Telegraph Co. *v.* Cooper, 20 S. W. Rep. 47.

the telegrams were messages summoning doctors to attend sick persons, the negligent delivery of the telegrams was held to give the sender a cause of action for injury to his feelings, as well as pecuniary damages. In the earlier of these cases,[1] the court held that the mental anguish of the father, who was the plaintiff, caused by the delay, was an element of damages, but the sufferings of the child or other relatives could not be taken into account. In the latter case,[2] the father sued both in his own right and as next friend of his son. The court defeated the action of the father on the ground of contributory negligence, because he did not summon some other physician when it was evident that the one desired was not coming, but sustained the action of the son for his physical injury and sufferings. In several other cases the same principle was maintained.[3]

§ 642. **Extension of this Line of Cases.** — This line of cases where the message pertained to sickness or death of relatives or friends has been extended in recent decisions of the same State in two directions. The first case was one where the telegram was sent by the plaintiff to make inquiry as to his lost child. The message in question was addressed to an uncle to whose house it was supposed he might have gone, and was, "Is Fred there? Left yesterday. Answer quick." The telegram was not delivered promptly, and it was held that the parents could recover damages for the mental suffering caused to them by the delay in the delivery of the message.[4] In another case the facts were that the plaintiff's

[1] Gulf, Colorado & Santa Fe Telegraph Co. *v.* Richardson, *supra.*

[2] Western Union Telegraph Co. *v.* Hoffman, *supra.*

[3] Erie Telegraph & Telephone Co. *v.* Grimes, 82 Tex. 89; Western Union Telegraph Co. *v.* Nations, 82 Tex. 540; Lydon *v.* Western Union Telegraph Co., 82 Tex. 366; Potts *v.* Western Union Telegraph Co., 82 Tex. 545; Western Union Telegraph Co. *v.* Stephens, 2 Tex. Civ. App. 129; Western Union Telegraph Co. *v.* Berdine, 2 Tex. Civ. App. 520; Western Union Telegraph Co. *v.* Merrill, Tex. Civ. App. 22 S. W. 826.

[4] Womack *v.* Western Union Telegraph Co., 58 Tex. 179.

daughter, who was fifteen years of age, had eloped. The plaintiff, being desirous of preventing the marriage, telegraphed to the clerk of the county not to issue a license, as the daughter was under age. The telegram was delayed, and did not arrive at the clerk's office until after the couple were married. The court held that the father could recover for damage to his feelings.[1]

§ 643. **Action by Addressee.** — There have been many actions by the addressees of telegrams to recover damages for mental distress caused by delay or error in the transmission of the message. The decisions of the courts on the question of whether such an action can be maintained in cases where nothing but mental distress has been alleged as damage, are not uniform. There is a number of reputable decisions holding that such damages may be recovered. The first case in this line was in Texas,[2] which is said to have been decided on a statement in a text-book to the effect that such damages might be recovered. This case has not been uniformly followed in its own State, but there have been similar decisions in many other States.[3] In a recent case in Alabama where a message was sent, "How is ma? Answer at once," the message being sent by a brother to his sister, and another brother sent an answer which was negligently delayed by

[1] Western Union Telegraph Co. *v.* Procter, 6 Tex. Civ. App. 303.

[2] So Relle *v.* Western Union Telegraph Co., 55 Tex. 308.

[3] Stuart *v.* Telegraph Co., 66 Tex. 580; Western Union Telegraph Co. *v.* De Jarles, 27 S. W. Rep. 792; Wadsworth *v.* Western Union Telegraph Co., 86 Tenn. 695; Reese *v.* Western Union Telegraph Co., 123 Ind. 294; Beasley *v.* Telegraph Co., 39 Fed. Rep. 181; Western Union Telegraph Co. *v.* Grigsby, 29 S. W. Rep. 406; Western Union Telegraph Co. *v.* Stratemeier, 6 Ind. App. 125; Western Union Telegraph Co. *v.* Henderson, 89 Ala. 510; Thompson *v.* Western Union Telegraph Co., 106 N. C. 549; Chapman *v.* Western Union Telegraph Co., 90 Ky. 265; Mentzner *v.* Western Union Telegraph Co., 62 N. W. Rep. 1; Young *v.* Western Union Telegraph Co., 107 N. C. 370; Thompson *v.* Western Union Telegraph Co., 107 N. C. 449; Western Union Telegraph Co. *v.* Kinsley, 28 S. W. Rep. 831. Cf. § 631.

the telegraph company, it was held that the person sending the first message, requesting an answer, made the person sending the reply his agent, and consequently might maintain an action of contract on the telegram, and recover nominal damages for the breach, and in addition damages for mental suffering.[1]

§ 644. **Statement of Grounds of this Class of Decisions.** — The best statement of the ground on which these cases can be supported is given in a recent case in Kentucky. "It seems to us that both reason and public policy require that it (telegraph company) should answer for all injury resulting from its negligence, whether it be to the feelings or the purse, subject only to the rule that it must be the natural and proximate consequence of the act. The injury to the feelings should be regarded as part of the actual damages. If it be said that it does not admit of accurate pecuniary measurement, equally it may be said of any cause, when mental anguish enters into the estimate of a wrong, and it furnishes no sufficient reason why an injured party should not be allowed to look to the wrong-doer for reparation."[2] Or, as the reasoning is stated in another case, the principle of the mental damages cases is that when the message is of such a nature as to put the telegraph company on its guard as to its great importance, and to thus bring home to it notice that its failure to promptly deliver the message will probably result in great grief and mental suffering to the sender or the addressee of the message, then the action can be maintained and damages for the mental suffering occasioned by the negligent failure of the company to deliver the message promptly can be recovered.[3]

§ 645. **Cases denying Mental Damages.** — On the other hand, in a number of cases, the courts deny that such actions

[1] Western Union Telegraph Co. *v.* Cunningham, 99 Ala. 314; on the subject of actions by addressee, see *ante*, §§ 454–457, 460–473. Cf. § 634.

[2] Chapman *v.* Western Union Telegraph Co., 90 Ky. 265.

[3] Tyler *v.* Western Union Telegraph Co., 54 Fed. Rep. 634.

may be maintained, and adhere to the old rule that the law cannot give damages for mental distress except in connection with physical injuries, and in one or two isolated classes of cases. The federal courts are almost unanimous in adhering to this line of decision.[1] In the Crawson case cited below the court recognizes the double line of decisions on this point, but holds that the better rule is to deny such damages.

It is noticeable in the Gahan case in Minnesota that the statute contained the same phrase, "actual damages," which was held in Indiana to include "mental distress;" but the court in the Gahan case would give no such meaning to the phrase.

The great difficulty with such damages is the difficulty of estimating and proving them. There are no facts to go by.[2]

The only case in the federal courts opposed to this line of decisions is the case of Beasley *v.* Western Union Telegraph Company,[3] a case at *nisi prius*, in which the subject was not carefully considered, and the court simply held that the damages recoverable by the plaintiff for delay in informing him of the sickness of his wife should be limited to disappointment and anguish suffered by the plaintiff from inability to be with his wife before her death, and that no punitive damages should be allowed, nor should the plaintiff be allowed to recover for the grief naturally arising from the mere fact of his wife's death.

§ 646. **State Decisions denying Mental Damages.** — There are also numerous decisions in the State courts which sustain the rule of the federal courts, and hold that damages

[1] Chase *v.* Western Union Telegraph Co., 44 Fed. Rep. 554; Crawson *v.* Western Union Telegraph Co., 47 Fed. Rep. 544; Gahan *v.* Western Union Telegraph Co., 59 Fed Rep. 433; Tyler *v.* Western Union Telegraph Co., 54 Fed. Rep. 634; Kester *v.* Western Union Telegraph Co., 55 Fed. Rep. 603; Western Union Telegraph Co. *v.* Wood, 57 Fed. Rep. 471 (Tex.); Western Union Telegraph Co. *v.* Gidcumb, 28 S. W. Rep. 699.

[2] Kester *v.* Western Union Telegraph Co., 55 Fed. Rep. 603.

[3] 39 Fed. Rep. 181.

for mental suffering and pain caused by the negligence of the telegraph company in transmitting or delivering the message, cannot be recovered except when accompanied by physical injury or pecuniary damages, unless in cases where malice or wantonness of the telegraph operators renders the imposition of punitive damages lawful.[1] In Alabama the court distinguishes actions of tort from actions of contract, holding that in the latter mental damages only cannot be recovered.[2]

§ 647. **Courts adhere to Old Rule.** — In the cases cited above the courts adhere to the old rule, which is unquestionably settled in all other branches of the law, that damages for mental suffering alone cannot be recovered except as a matter of exemplary or punitive damages; that in order to be the subject of indemnification, the mental sufferings must accompany either some pecuniary loss or some injury to the person, except in one or two well-defined exceptions, such as actions for breach of promise of marriage; and even there the damages have been supported upon the pecuniary loss suffered by the plaintiff. The courts admit the strong arguments that may be made in favor of supporting a claim for such damages, but feel themselves obliged to follow the old beaten tracks, or, as the court in one case expresses it, "to go *super antiquas vias.*"

§ 648. **Reasons for allowing such Damages.** — These are certainly strong points in favor of the decisions which hold that damages for mental distress alone may be recovered in such

[1] Russell *v.* Western Union Telegraph Co., 3 Dakota, 315; Western Union Telegraph Co. *v.* Rogers, 68 Miss. 748; International Ocean Telegraph Co. *v.* Saunders, 32 Fla. 434; Butner *v.* Western Union Telegraph Co., 37 Pac. Rep. 1087; Connell *v.* Western Union Telegraph Co., 116 Mo. 35; Chapman *v.* Western Union Telegraph Co., 88 Ga. 763; Summerfield *v.* Western Union Telegraph Co., 87 Wisc. 10; Blakeney *v.* Western Union Telegraph Co., 22 Cent. Law Journ. 147.

[2] Western Union Telegraph Co. *v.* Wilson, 93 Ala. 32; Western Union Telegraph Co. *v.* Cunningham, 99 Ala. 309.

cases. The great reliance of the public for keeping large corporations to their duty in matters relating to the conduct of their business, is the right of action against them by individuals who are injured by their negligence; and this reason applies with peculiar force to telegraph companies, on account of the practical monopoly of the telegraphic business. To be sure, in some States a penalty is by statute imposed upon telegraph companies in every case of negligence in the conduct of their business, without regard to the question of what damages may have been suffered by the plaintiff; but this is true of only a small number of States, and in all the others to hold that damages cannot be recovered, in cases where no pecuniary loss can be shown, is to free telegraph companies from any incentive to the performance of their duties with care and skill and promptness in cases where no pecuniary loss is involved, except such cumbersome machinery as an information by the attorney-general, with a view to the revocation of their charter, which, in any event, would only be adopted in cases of extreme and long-continued negligence on the part of the telegraph company hardly to be imagined. The ingenuity of counsel has succeeded in most cases in introducing some element of pecuniary damages upon which the case can rest, such as the recovery of the price of the message or other slight pecuniary damages; but this does not seem to be as broad a principle as the importance of the case would demand. On the other hand, it is unquestionably a great innovation in the principles of law to allow recovery of damages for injury to the feelings alone, on account of the wholly metaphysical and unreal character of the damages, and the difficulty of admeasurement. On the whole, it must be questioned whether the step of allowing such damages is not too long a one for the courts to make; that it, in fact, would be judicial legislation, which is always to be avoided; but that the legislatures of the various States should remedy

this difficulty by statute, allowing the recovery of such damages in proper cases.

§ 649. **Language of the Message.** — The courts which hold that damages for mental suffering may be recovered in these cases base the recovery, as was stated in a previous section, upon the fact that the language of the message gives direct notice to the telegraph company that the message concerns important social events, and that negligence on its part is likely to be followed by mental suffering and distress to the parties, and that the subject-matter of the contract for transmitting the telegram is a matter of feeling only, and that as damages are allowed for pecuniary loss when the subject-matter of the telegram is a pecuniary transaction, so damages should be allowed for injury to the feelings when the subject-matter of the telegram is a transaction involving feelings. Thus messages which, on their face, show that they relate to the sickness or death of relatives, give direct information to the telegraph company of the nature of the damages which may be suffered through its negligence. For instance, in a case where the telegram was, "Father come at once. Mother is sick," it was held that damages for mental distress caused by the delay in delivering this telegram might be recovered, although no physical pain or pecuniary loss had been suffered.[1]

§ 650. **Same Subject** (*continued*). — So where the message was, "Come in haste. Your wife is at the point of death," it was held that similar information was given to the telegraph company. The court in this case, as in many others, admits the difficulty of measuring the damages, but says that it is not more difficult to measure them in such cases as these than it is in other cases where such damages are well settled, and further adverts to the danger to the public in allowing telegraph companies to escape all responsibility

[1] Thompson *v.* Western Union Telegraph Co., 106 N. C. 549.

as to a class of messages which forms so large a portion of its business.[1]

§ 651. **Reasoning in Wadsworth v. Western Union Telegraph Company.** — In this case the court discusses the subject at great length, and supports its decision on the following reasoning: first, that damages for mental suffering may be recovered in all cases where *any* damage can be recovered; second, that whenever any legal right is infringed, some damage results; and third, that the plaintiff had a legal right to have the messages transmitted promptly, and that this right had been infringed by the delay. The court in this case again rests the equity of its decision upon the ground that the language of the telegraph message gives the telegraph company full information as to its importance, and that it would be very bad policy to allow telegraph companies to escape all liability in so large a class of cases.

§ 652. **Newport News & M. V. R. Co. v. Griffin.** — This case was followed in the same State in a later case,[2] where the telegram stated that the plaintiff's father was in a dying condition, and asked him to come at once and bring a surgeon. The telegram was never forwarded, but the plaintiff came home a few days later, before his father's death. The court rests the right of the plaintiff in this case to maintain his action upon the language of the statute which says that any "aggrieved" party may recover damages, and that the plaintiff in this case, although not the sender of the message, was an aggrieved party by the negligent transmission, and says, "He had such an interest or benefit in said telegram as would give him a right of action for damages against the company for negligently failing to send the telegram."

§ 653. **Texas Cases.** — In Texas the line of cases holding telegraph companies responsible for mental sufferings caused

[1] Cf. Wadsworth *v.* Western Union Telegraph Co., 86 Tenn. 695.

[2] Newport News & M. V. R. Co. *v.* Griffin, 92 Tenn. 691.

by their negligence in transmitting or delivering messages has been very fully developed.[1] In this State was decided the first case holding that mental suffering alone is a sufficient cause of action, in opposition to the universal current of authority in all other classes of cases. This was the case of So Relle *v.* Western Union Telegraph Company.[2] This was an action of damages in which the question was the liability of the telegraph company for injury resulting to the feelings of a person from the wilful neglect of the agent of the telegraph company to transmit and deliver a message announcing the death of such person's mother, and requesting his presence at the funeral, etc.

§ 654. **So Relle v. Western Union Telegraph Company.** — The facts were that the plaintiff's mother died on the 16th day of January, 1874, near a small town in Texas; that on that day a near relative of hers prepared the message, and delivered the same to the telegraph company's agents in said town to be promptly transmitted and delivered to the plaintiff at Austin, and paid the charge for such service; that the company's operators did not transmit the message, and cause it to be delivered within a reasonable time, although the plaintiff was in the city of Austin, and at his usual place of business, but "wilfully" neglected and failed so to do for several days after the date of sending, and by reason of such "wilful" neglect and failure, the plaintiff was prevented from being present at the funeral services of his mother, and providing for her remains being properly cared for, and from paying to her the last tribute of respect, etc., for which plaintiff claimed the sum of $50,000 as damages. The attention of the court appears to have been principally turned to the question as to whether the damages to the feelings were general or special damages; that is, whether they ought to have been pleaded specially, or might

[1] See also *ante*, §§ 638, 643, and cases therein cited.

[2] 55 Tex. 308.

be claimed under the general allegations of damage, and decides that they are natural damages, and need not be specially pleaded.

§ 655. **Opinion of Court in So Relle's Case.** — But the court also says, "It appears to be the settled rule of law in this State that injury to the feelings caused by the wilful neglect or fault of another, constitutes such actual damages for which a recovery may be had," citing therefor two cases against railroad companies, and then quotes from Shearman and Redfield on Negligence, where the authors say: "In case of delay or total failure to deliver a message relating to matters not connected with business, such as personal or domestic matters, we do not think that the company in fault ought to escape with mere nominal damages on account of the want of strict commercial value in such messages. Delay in the announcement of a death, an arrival, the straying or recovery of a child, and the like, may often be productive of an injury to the feelings which cannot be estimated in money, but for which a jury should be at liberty to award fair damages," and the court holds that such damages are actual damages for which a recovery may be had.

§ 656. **Cases following So Relle's Case.** — This case was not, it is believed, intended to decide the point that mental sufferings alone constitute damages for which recovery may be had, and in a succeeding case in the same State,[1] a claim of this nature was not allowed. In this case the message was from a son to his father announcing the death of the son's wife and child. The son was among strangers, and without money, and in great need of assistance from his father, and sent a telegram of the above nature, which was unreasonably delayed in delivery; and for that reason the father was prevented from going to the assistance of his son, and from supplying him with money, and the son was harassed by creditors, and had to sell his property, — and other

[1] Gulf, Colorado & Santa Fe R. Co. *v.* Levy, 59 Tex. 542, 563.

damages. The court in discussing the case first stated that no allegation or proof of any damages to the appellee was made, unless mental suffering alone constitutes such character of injury as will entitle a person to damages in an action based upon negligence; and then discusses this question, and decides it in the negative, in accordance with the great current of authorities.[1] The court adverts to the case of So Relle, saying that it is cited to them as an authority for the proposition that an action for mental suffering alone might be maintained, but that the opinion in that case does not seem to maintain the proposition.

§ 657. **Texas Cases** (*continued*). — These cases were followed by a number of cases in which the action was by the addressee of the telegram, the message being in language which conveyed its great importance, in which cases the court uniformly held that the plaintiff could recover damages for mental suffering.[2] The principle upon which these cases were decided was that the message was for the benefit of and related to the affairs of the addressee only; that the sender was therefore, in fact, the agent of the addressee to cause the message to be transmitted, and that the contract of the sender with the telegraph company being for the benefit of the addressee, the latter could sue on it. He thus was able to sue the telegraph company in contract, and to recover at least the nominal damages of the price of the message, and in addition all the damages to the feelings sustained by him through the negligence of the telegraph company.

[1] Citing Canning *v.* Williamstown, 1 Cush. 452; Lynch *v.* Knight, 9 H. L. C. 577; and other cases.

[2] Stuart *v.* Western Union Telegraph Co., 66 Tex. 580; Western Union Telegraph Co. *v.* Adams, 75 Tex. 531; Western Union Telegraph Co. *v.* Feegles, 75 Tex. 537; Western Union Telegraph Co. *v.* Moore, 76 Tex. 66; Western Union Telegraph Co. *v.* Rosentreter, 80 Tex. 406; Western Union Telegraph Co. *v.* Jones, 81 Tex. 274; Western Union Telegraph Co. *v.* Houghton, 82 Tex. 561; Western Union Telegraph Co. *v.* Beringer, 84 Tex. 38; Western Union Telegraph Co. *v.* Carter, 85 Tex. 580;

§ 658. **Relationship of Parties shown by Message.** — In one of the earlier cases in Texas the court tried to establish a limitation of this rule to the effect that the language of the message must show such relationship between the sender and the addressee, or the parties to the message, and the person whose health or other affairs it concerns, as to give the telegraph company information that an injury to the feelings of the parties sending or receiving the message would result from its negligence.[1]

§ 659. **Same Subject** (*continued*). — In a later case the court modified this rule somewhat, saying that the language of the telegram need not show the relationship of the parties, for such a rule would be unreasonable, but must show enough to put the telegraph company upon inquiry as to the relationship. The message in this case was, "Clara come quick. Rufe is dying," and this language was held to be enough to put the telegraph company upon inquiry.[2] This modification of the rule was also affirmed in the case of Western Union Telegraph Company *v.* Feegles,[3] and later cases.[4]

§ 660. **Same Subject** (*continued*). — On the other hand, in the case of Western Union Telegraph Company *v.* Kirkpatrick,[5] where the message was, "Come on first train.

Western Union Telegraph Co. *v.* Wisdom, 85 Tex. 261; Ikard *v.* Western Union Telegraph Co., 22 S. W. Rep. 534; Western Union Telegraph Co. *v.* McLeod, 22 S. W. Rep. 988; Western Union Telegraph Co. *v.* Housewright, 5 Tex. Civ. App. 1; Western Union Telegraph Co. *v.* Karr, 5 Tex. Civ. App. 61; Western Union Telegraph Co. *v.* Jobe, 6 Tex. Civ. App. 407; Western Union Telegraph Co. *v.* Zane, 6 Tex. Civ. App. 586; Western Union Telegraph Co. *v.* Womack, 29 S. W. Rep. 932; Western Union Telegraph Co. *v.* Cooper, 71 Tex. 507.

[1] Western Union Telegraph Co. *v.* Brown, 71 Tex. 723.

[2] Western Union Telegraph Co. *v.* Adams, 75 Tex. 531.

[3] 75 Tex. 537.

[4] Western Union Telegraph Co. *v.* Womack, 29 S. W. Rep. 932; Western Union Telegraph Co. *v.* Jeanes, 29 S. W. Rep. 1130; Western Union Telegraph Co. *v.* McMillan, 30 S. W. Rep. 298.

[5] 76 Tex. 217.

Bring Ferdinand. His father is very low," it was held that the message showed nothing to put the telegraph company upon inquiry. In Western Union Telegraph Company *v.* Moore,[1] the message, "Billy very low. Come at once," was held to put the telegraph company upon inquiry.[2] In the case of Western Union Telegraph Company *v.* Carter,[3] the court expressly overrules Western Union Telegraph Company *v.* Brown,[4] in so far as the same decides that a telegram must show the relationship of the parties, and it would seem to be the rule now in Texas, as in some other States, that whenever the language of the message shows that it relates to illness or death, the language itself is information to the telegraph company that injury to the feelings is likely to result from negligence in transmitting or delivering it, and the addressee can have his action against the telegraph company for such injury, although it is the only damage claimed outside of the price of the message, the action in such cases being in contract, and the addressee relying upon the implied agency of the sender in transmitting the message.[5]

It is noticeable that the federal court in Texas has taken an opposite view from the State courts on this subject,[6] the federal court holding that as this was a matter of general law, it was not bound by the decision of the State courts, but could decide the matter on general principles.

[1] 76 Tex. 66.

[2] The same ruling was made on analogous messages in Western Union Telegraph Co. *v.* Rosentreter, 80 Tex. 406, and Western Union Telegraph Co. *v.* Jones, 81 Tex. 274, and Western Union Telegraph Co. *v.* Beringer, 84 Tex. 38.

[3] 85 Tex. 580. [4] 71 Tex. 723.

[5] Western Union Telegraph Co. *v.* Evans, 1 Tex. Civ. App. 297; s. c. 5 Tex. Civ. App. 56; Western Union Telegraph Co. *v.* Linn, 26 S. W. Rep. 491; Western Union Telegraph Co. *v.* Fore, Ib. 783; Western Union Telegraph Co. *v.* Carter, 2 Tex. Civ. App. 626; Western Union Telegraph Co. *v.* Smith, 30 S. W. Rep. 549, 937; Western Union Telegraph Co. *v.* Coffin, 30 S. W. Rep. 896. Cf. *ante*, § 643.

[6] Western Union Telegraph Co. *v.* Wood, 57 Fed. Rep. 471.

§ 661. **Statute of Limitations.** — The courts of Texas seem to have been led into a certain inconsistency in following out the line of decisions which has been discussed above; for in laying the foundations for this species of recovery, they have declared the action to be an action of contract, and based the recovery upon the fact that the plaintiff recovers the price of the message as pecuniary damages, and mental sufferings as aggravation; whereas, in a recent case, the same court has decided that such an action for mental sufferings is action for injury to the person, — that is, an action of tort, — and is barred by the lapse of one year under the Texas statute of limitations. This decision perhaps implies a still further assimilation of the Texas cases to the ordinary cases holding that damages may be recovered by the addressee of a message for mental sufferings, the courts in other States in such cases holding that the action is one of tort, and that the damages for mental suffering are recoverable simply because they are the natural, direct, and proximate results of the negligence of the defendant.[1]

§ 662. **Amount of Damages.** — It is, of course, impossible to prove in dollars and cents the amount of injury which the plaintiff has suffered in cases where the injury is to his feelings. The courts in some States have therefore established the rule that the plaintiff need not give any evidence of the amount of such sufferings, provided they are such as would naturally flow from the injury complained of, and the jury may assess such amount as they choose,[2] the verdict of the jury being conclusive as to the propriety of the amount, unless it is so large as to convince the court of appeals that the verdict was the result of corruption, passion, or prejudice. It has been held that a verdict of $4,500.25 for failure to deliver to the plaintiff a telegram from his wife, informing him that a sick child of theirs was worse, was an

[1] See *supra*, § 643 *et seq.*

[2] Western Union Telegraph Co. *v.* Cunningham, 99 Ala. 309.

excessive verdict, and shocked the sense of justice of the court.[1]

§ 663. **Excessive Damages.** — This principle was followed in a later case, where the jury rendered a verdict of $4,750 as compensation for mental sufferings, and the court held that this was so great an amount as to show that the verdict was the result of prejudice on the part of the jury.[2] This case relied upon the case of Western Union Telegraph Company *v.* Evans,[3] in which the court, following the case of Western Union Telegraph Company *v.* Houghton,[4] held that a verdict of $5,000 for mental sufferings was too great. The court adverts in this case to the fact that there can be no evidence which would settle in dollars and cents the measure of damages for mental sufferings, and that the jury is at liberty to make its own estimate of these sufferings, and their verdict is conclusive unless the amount given by them is so excessive as to show passion or prejudice. The court, however, says that it is not irrelevant for the plaintiff to testify as to the strength of his emotions upon the facts in the case. At least that such evidence, when admitted, is not cause for reversing the verdict.[5] In another case where the negligence of the telegraph company caused a delay of twelve hours in the arrival of a physician, the court held that a verdict of $1,999.99 was excessive.[6] In a later case the court held that a verdict of $1,000 was not excessive under the circumstances of the case,[7] and similarly of a verdict for $500.[8]

[1] Western Union Telegraph Co. *v.* Houghton, 82 Tex. 561. Cf. Stuart *v.* Western Union Telegraph Co., 66 Tex. 580.

[2] Western Union Telegraph Co. *v.* Piner, 1 Tex. Civ. App. 301.

[3] 1 Tex. Civ. App. 297, s. c. affirmed 5 Tex. Civ. App. 56.

[4] *Supra.*

[5] Cf. Western Union Telegraph Co. *v.* McLeod, 22 S. W. 988; Western Union Telegraph Co. *v.* Carter, 85 Tex. 580.

[6] Western Union Telegraph Co. *v.* Berdine, 2 Tex. Civ. App. 520.

[7] Western Union Telegraph Co. *v.* Stephens, 2 Tex. Civ. App. 120.

[8] Western Union Telegraph Co. *v.* Hill, 26 S. W. Rep. 252.

§ 664. **Exemplary or Punitive Damages.** — In States where the courts allow punitive or exemplary damages in actions of tort, the courts have held that the plaintiff in an action against a telegraph company for negligence in transmitting a message may, if he shows such negligence as amounts to a wanton or malicious purpose on the part of the telegraph company, or actual malice, recover exemplary or punitive damages.[1] A simple allegation, however, of gross negligence on the part of the telegraph company does not entitle the plaintiff to recover exemplary damages.[2] It seems that if the plaintiff, in making his claim, divides it into two portions, one representing his actual damages and the other his exemplary damages, he will not be limited to this division, but may recover the total amount of his claim either as actual or exemplary.[3]

[1] West *v.* Western Union Telegraph Co., 39 Kan. 93; Western Union Telegraph Co. *v.* Morris, 77 Tex. 173; Western Union Telegraph Co. *v.* Rogers, 68 Miss. 748; Western Union Telegraph Co. *v.* Cunningham, 99 Ala. 309.

[2] Western Union Telegraph Co., *v.* Godsey, 16 S. W. Rep. 789.

[3] Western Union Telegraph Co. *v.* Morris, *supra.*

CHAPTER XXIX.

TELEGRAMS AND TELEPHONIC COMMUNICATIONS AS EVIDENCE.

§ 665. Telegraphic Messages as Evidence.
666. Written Telegram.
667. Proof of Custom to Destroy Messages.
668. Which Telegram is the Original.
669. Durkee *v.* Vermont Central Railroad Company.
670. Proof of Sending Telegram.
671. Signature of Sender or Agent.
672. Message as Admission.
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674. Presumption of Receipt from Sending.
675. Notice to Produce Telegram.
676. Identification of Telegram.
677. Telephone Messages as Evidence.
678. Instances of Conversations.
679. Same Subject (*continued*).
680. Not Admitted as Evidence.

§ 665. **Telegraphic Messages as Evidence.** — As to the admissibility of oral evidence of the contents of a telegram if nothing appears to show that the telegram was in writing, there is no objection to the proof of its contents by oral testimony, for, although in the ordinary course of business most telegrams are in writing, there is no legal presumption of this, though slight evidence of this fact would be sufficient.[1]

§ 666. **Written Telegram.** — If, however, the telegram appears in the evidence to have been in writing, the usual rule of evidence applies that the original telegram must be produced, and that secondary evidence of its contents, either oral or written, cannot be introduced until it is shown to the satisfaction of the court that the original is lost or has been destroyed, or is in the possession of the other party, who has been duly notified and fails to produce it.[2]

[1] Terre Haute & Indianapolis R. R. Co. *v.* Stockwell, 118 Ind. 98; Durkee *v.* Vermont Central Railroad Co., 29 Vt. 127; Wilson *v.* Minneapolis & N. W. Railroad Co., 31 Minn. 481; Deverson *v.* Eastern Railroad Co., 58 N. H. 129. Cf. Donovan *v.* Boston & Maine R. R. Co., 158 Mass. 453.

[2] Durkee *v.* Vermont Central Railroad Co., 29 Vt. 127; Western Union Telegraph Co. *v.* Collins, 45 Kan. 95; Barons *v.* Brown, 25 Kan. 410;

§ 667. **Proof of Custom to destroy Messages.** — If it is shown that the custom of the telegraph company is to destroy all despatches at the expiration of six months after their receipt, or that such is an established rule of the company, this proof, in connection with proof that the message in question was sent more than six months prior to the time when the evidence is offered, is sufficient in the discretion of the court to allow secondary evidence of the contents of the message.[1] But if it is also shown that the custom is, if any suit or dispute about a telegram arises within the six months, to forward all the papers to the superintendent of the central office, and that in fact a controversy had begun about the telegram in question within the six months, this proof has been held to make it necessary to account further for the original before secondary evidence is admissible,[2] for it makes it probable that the message is still in the custody of the telegraph company at its central office.

§ 668. **Which Telegram is the Original.** — The question of which is the original of a telegraphic message, the one which is given by the sender to the telegraph operator for transmission, or the one which is delivered by the company at the office of destination to the person to whom it is addressed, has been discussed in several cases. The first announcement of any principle governing this matter was made in Durkee *v.* Vermont Central Railroad Company.[3] In this case the court said that written telegrams, when they are relied upon to establish contracts, where their force and

Matteson *v.* Noyes, 25 Ill. 591; Morgan *v.* People, 59 Ill. 58; Chisholm *v.* Beaver Lake Lumber Co., 18 Ill. App. 131; Anheuser Busch Brewing Association *v.* Huntmacher, 29 Ill. App. 316; Riordan *v.* Guggerty, 74 Ia. 688; American Union Telegraph Co. *v.* Daughtery, 89 Ala. 191; McCormick *v.* Joseph, 83 Ala. 401; Williams *v.* Brickell, 37 Miss. 682; Saveland *v.* Green, 40 Wis. 431; Smith *v.* Easton, 54 Md. 138.

[1] Western Union Telegraph Co. *v.* Collins, 45 Kan. 95; Barons *v.* Brown, 25 Kan. 410; Riordan *v.* Guggerty, 74 Ia. 688.

[2] Western Union Telegraph Co. *v.* McMillan, 25 S. W. Rep. 821.

[3] 29 Vt. 127.

effect will depend upon the terms used, must be proved in the same manner as other writings, as letters and contracts are, and the rule depends on which party is responsible for the transmission over the wires, or, in other words, whose agent the telegraph is. The first communication in a transaction, if it is all negotiated across the wires, will only be effective in the form in which it reaches its destination. In such case inquiry is first to be made for the very despatch delivered. In default of that, its contents may be shown by the next best proof, which would ordinarily be a press or other copy; or the message given to the operator for transmission may be used, though it is not an original. But where the party to whom the communication is made is to take the risk of transmission, the message delivered to the operator is the original, and that is to be produced, or the nearest approach to it by way of copy or otherwise.

§ 669. **Durkee v. Vermont Central Railroad Company.** — In this case the telegrams in question were sent between the treasurer of a railroad company and a person he had employed to negotiate a loan for the company, and were sent during the progress of the negotiations. This case has been accepted as authority in a number of other cases, and it is unquestionably the rule that when a telegram is sent to a person directing or inviting him to take some action, and he afterwards brings suit, basing his claim upon the action which he was directed or invited by the telegram to take, the telegram received by him is the original.[1] The effect of this rule upon the contract between the parties is discussed in a later section.[2]

[1] Durkee *v.* Vermont Central Railroad Co., *supra;* Anheuser Busch Brewing Association *v.* Hutmacher, 29 Ill. App. 316; Morgan *v.* People, 59 Ill. 58; Riordan *v.* Guggerty, 74 Ia. 688; Wilson *v.* Minneapolis & N. W. Railroad Co., 31 Minn. 481; Western Union Telegraph Co. *v.* Fatman, 73 Ga. 285; Western Union Telegraph Co. *v.* Harris, 19 Ill. App. 347; Magie *v.* Herman, 50 Minn. 424.

[2] *Post*, § 684 *et seq.*

§ 670. **Proof of sending Telegram.** — Even where the copy of the telegram delivered to the addressee is held to be the original of the telegram, as above stated, there must be proof of the authorization of the transmission of the telegram by the person sought to be charged with it as an order, direction, or admission.[1] The reason that the copy delivered to the addressee is held to be the original is that the sender makes the telegraph his agent to transmit the telegram. If this fact of agency is contested, it must be established by proof. In the case in which the rule was established,[2] this fact of agency was admitted, and it is generally passed by without question in similar cases; but whenever it is denied it must be proved. Therefore it has been held that while the transcript delivered to the person addressed is for some purposes between him and the sender deemed the original, it never can be so without competent proof that the alleged sender did actually send or authorize to be sent the despatch in question.[3]

§ 671. **Signature of Sender or Agent.** — The primary and original evidence of that fact would be the telegram itself given to the telegraph operator in the handwriting of the sender or of an agent shown to have been duly authorized; but when it appears that the telegram has been destroyed by the company, secondary evidence of the essential fact may be given.[4] This fact of authorizing the sending of the telegram may be proved by circumstances as well as by direct proof. Thus if the person receiving a telegram sends an

[1] Oregon Steamship Co. *v.* Otis, 100 N. Y. 453; United States *v.* Babcock, 3 Dill. U. S. 571; Flint *v.* Kennedy, 33 F. R. 820; Richie *v.* Bass, 15 La. An. 668; Smith *v.* Easton, 54 Ind. 138; Chisholm *v.* Beaver Lake Lumber Co., 18 Ill. App. 134.

[2] Durkee *v.* Vermont Central Railroad Co., 29 Vt. 127.

[3] Cases *supra*, note 1.

[4] Oregon Steamship Co. *v.* Otis, 100 N. Y. 453; United States *v.* Babcock, 3 Dill. 571; Flint *v.* Kennedy, 33 Fed. Rep. 820; Richie *v.* Bass, 15 La. An. 668.

answer either by letter or telegram to the party from whom the telegram purports to come, and the latter does not disclaim the telegram, this is inferential proof that the first telegram was sent by him,[1] and so if goods ordered by telegram are partly paid for by the person sought to be charged.[2] If the message delivered is not the same as the one sent, the former is of course unauthorized.[3]

§ 672. **Message as Admission.** — When a telegram is offered simply as an admission of a party, not being a message sent between the parties to the suit, but being a message sent by one of the parties to a third person, it has been held that the message given by the sender to the company for transmission is the original, and must be offered in evidence or reasons shown for its non-appearance.[4] But no good reason appears why the telegram as delivered may not be used in the same way as secondary evidence, if it is proved to have been authorized by the party whom it is sought to charge, as, for instance, in any case where the telegram signed by the party to be charged is proved to have been lost, the one delivered by the telegraph company to the addressee may be put in evidence, or the contents may be proved by the telegraph operator.[5]

§ 673. **Actions against Telegraph Companies.** — When the telegram is to be used, not as supporting a contract between third parties, but in an action brought against the telegraph company for negligence in the transmission or delivery of the message, it has been said that the rule is that the plaintiff must prove his case, and if one material fact in the case is the delivery of the telegram to the telegraph company for

[1] Oregon Steamship Co. *v.* Otis, 100 N. Y. 453; Flint *v.* Kennedy, 33 Fed. Rep. 820.

[2] Culver *v.* Warren, 36 Kan. 391.

[3] See *post*, § 686.

[4] Barons *v.* Brown, 25 Kan. 410; Com. *v.* Jeffries, 7 Allen, 556; Matteson *v.* Noyes, 25 Ill. 481; Chester *v.* State, 5 S. W. Rep. 125; Howley *v.* Whipple, 48 N. H. 487.

[5] Smith *v.* Easton, 54 Md. 138.

transmission, the plaintiff must prove that fact, and when the telegram was delivered in writing, that telegram is the original evidence of such fact; but if its loss or destruction is proved, secondary evidence may be admitted.[1] If the plaintiff's case depends upon an erroneous or negligent delivery of the message to the addressee, then the plaintiff must prove the erroneous or negligent delivery to the addressee, and in order to prove this latter fact, he must produce the message which was delivered by the telegraph company to the addressee, or account for its absence as usual in regard to written documents, this message in such a case being original and primary evidence of the necessary fact.[2] In the cases in which the rules above stated are laid down, no mention is made of the rule which allows a party to a suit to notify the other party to produce documents in the latter's possession, and in default of such production, to introduce secondary evidence of their contents; yet in most cases against telegraph companies, the telegram given to the operator for transmission is in the company's possession, and it would seem therefore that in such cases the other party might give the usual notice to produce the telegram, and in default of such production, might give secondary evidence of its contents, without being obliged to prove the loss or destruction of the original, this proof being necessary only when the telegraph company wished to introduce such evidence, or when the message delivered to the addressee is in question, that being presumably not in the possession of the telegraph company.[3]

[1] Western Union Telegraph Co. *v.* Hopkins, 49 Ind. 227; Western Union Telegraph Co. *v.* Collins, 45 Kan. 95; American Union Telegraph Co. *v.* Daughtery, 89 Ala. 191.

[2] Western Union Telegraph Co. *v.* Harris, 19 Ill. App. 347; Western Union Telegraph Co. *v.* Bates, 93 Ga. 352. If a demand or notice of claim in a suit for damages against a telegraph company is in writing, it must be produced or accounted for, and oral evidence is not admissible. Western Union Telegraph Co. *v.* Bates, *supra*.

[3] See *post*, § 675.

§ 674. **Presumption of Receipt from Sending.** — There is a presumption of fact, or rather an inference, that when a telegram has been delivered to a telegraph company, and accepted by the operator for transmission, it was duly forwarded and received by the addressee. This presumption may, of course, be overcome by contrary evidence, but in the absence of such evidence it stands.[1]

§ 675. **Notice to produce Telegram.** — The usual rule applies to telegrams that when the telegram is in the possession of one of the parties to a suit, and the other party desires it produced in court, he must notify the party supposed to hold it to produce it before he can put in secondary evidence of its contents.[2] In cases, however, where the very nature of the action shows that the party bringing it charges the other party with the possession of the telegram, as where the plaintiff sues the telegraph company for negligence in the transmission or delivery of a message given it to transmit, the rule as to notice has not been insisted upon, the courts apparently considering that notice in such case is not necessary, for the reason that the action is based upon the document in question, and the form of action shows the defendant that it is charged with the possession of the telegram, or else regarding the question as one of the introduction of secondary evidence of a writing on proof of the loss or destruction of the original.[3] This point was raised and discussed in a Texas case,[4] which holds that in such cases notice need not be given to the telegraph company to produce the telegram in question, because in such an action the telegraph company is apprised from the nature of the suit that the other party intends to charge it with the possession of the message which was delivered to it for trans-

[1] Com. *v.* Jeffries, 7 Allen, 556.

[2] Western Union Telegraph Co. *v.* Lindley, 89 Ga. 484. Compare *ante*, § 673.

[3] See *ante*, § 673.

[4] Reliance Lumber Co. *v.* Western Union Telegraph Co., 58 Tex. 394.

mission. In some cases this point is not considered at all, the question being treated as wholly a matter of proof of loss of the original.[1]

§ 676. **Identification of Telegram.** — In cases involving the negligence of the telegraph company in the transmission or delivery of a message, it is necessary in the pleadings to describe the message sufficiently to identify it, and this is generally done by stating the day on which the despatch was delivered to the company. If the proof shows that the despatch was in fact delivered to the company on a different day, this is not a fatal variance if there is sufficient other evidence in the case to show that the message proved is the message relied upon in the allegations of the complaint.[2]

§ 677. **Telephone Messages as Evidence.** — It has been held that the answers which may be made to persons calling up a party by his number in the telephone directory, and through the central office, are evidence against him in the nature of admissions, and this whether or not the witness who proves these answers can identify the voice of the person giving the replies.[3] This is on the principle that when a person places himself in connection with the telephone system by subscribing thereto, and having an instrument in his office, he thereby invites communications through this instrumentality, and therefore conversations so held are admissible in evidence in the same manner that personal interviews by a customer with an unknown clerk in charge of an ordinary shop would be admitted in relation to the business therein carried on, and the fact that the voice was not identified does not render the conversation inadmissible, but may affect the weight of such evidence before the jury.[4]

[1] Western Union Telegraph Co. *v.* Collins, 45 Kan. 95; and see *ante*, § 673.

[2] Western Union Telegraph Co. *v.* Kilpatrick, 97 Ind. 42.

[3] Wolfe *v.* Missouri Pacific Ry. Co., 97 Mo. 473; Sullivan *v.* Kuykendall, 82 Ky. 483; Globe Printing Co. *v.* Stahl, 23 Mo. App. 451; Wilson *v.* Minneapolis & N. W. Railroad Co., 31 Minn. 481.

[4] Wolfe *v.* Missouri Pacific Ry. Co., 97 Mo. 473.

§ 678. **Instances of Conversations.** — In a recent case the facts were that the witness called up the plaintiff's office through the central office, but could not identify the voice of the person answering as the voice of the plaintiff. The court, however, held that telephonic replies from anybody answering on the telephone exchange to the call of the number of either party to a suit was admissible against the party, in the absence of evidence showing that he was not authorized to represent the subscriber.[1] In another case, a witness who was an employee of the plaintiff, testified that the defendant had two numbers in the telephone directory, one being his office and the other his warerooms; that he, the witness, called up by telephone to the central office of the Bell Telephone Company for the defendant's number, and was by the central office connected therewith; that the witness could not remember which of the two numbers he called, but that he was sure it was one of them; that there was an answer from the defendant's number to the telephone call; that he, the witness, did not know whose voice it was, and could not testify whose voice it was, and that he did not know the defendant's voice, and did not know the defendant; that he asked through the telephone if that was Stahl (the defendant) and the answer was "Yes." Witness asked why the defendant did not pay the bill for which the suit was brought, and the party answering said, "All right. I will attend to that matter about the first of the month." The court held that it could judicially notice the invention of the telephone and its adoption as a commercial instrument, and its use in telephone exchanges, and that the person answering to the name of the subscriber upon his proper number being called up must be considered to be *prima facie* the person to whose name he replies.[2]

[1] Wolfe *v.* Missouri Pacific Ry. Co., 97 Mo. 473.

[2] Globe Printing Co. *v.* Stahl, 23 Mo. App. 451.

§ 679. **Same Subject** (*continued*). — In another case a conversation over a telephone was admitted under the following circumstances. The plaintiff's agent, wishing to talk with some one representing the defendant, went to the telephone central office in his town and called up an adjoining town. As the agent could not talk over the telephone, he got the operator to do it for him. The operator in the town called up told the operator at the calling town that he would send for the person required, and soon after the calling operator was told that such person was in the office of the called station. There was then conversation over the telephone between the calling operator and the person present in the called office, the calling operator repeating the conversation to the plaintiff's agent. At the trial the party called admitted having a conversation over the telephone on the subject, but his statement of the conversation differed widely from that of the plaintiff's agent. It was held that the conversation might be admitted against the party called on the ground that he made the calling operator his agent to repeat the conversation over the telephone to the plaintiff's agent.[1] It will be noticed that two grounds of admissibility are advanced in the cases cited. First, agency, and second, that there is *prima facie* proof of identity. It may perhaps be considered that either will sustain the admissibility with certain limitations, *i. e.*, the replies if relied upon as admissions must either be of such a nature as a general clerk or employee might make, while if they are relied upon as personal communications of the party addressed there must be some proof of his identity, either from the nature of the replies, the sound of the voice, or otherwise.

§ 680. **Not admitted as Evidence.** — In a case in New York this subject was considered, and a decision slightly at variance with the foregoing rule was arrived at, so far as the language of the court is concerned, although it is believed

[1] Sullivan *v.* Kuykendall, 82 Ky. 483.

that the facts of the case rendered the case in substance not inconsistent. In this case the question whether the telephone message was evidence without identification of the voice was considered by the court, and it was held that such identification was necessary. In this case, however, the question arose on the sufficiency of an affidavit authorizing an attachment, the statute requiring the affidavit to set forth the sources of information on which it was made, so that the court might pass upon them. The affidavit in question stated that the sources of information were a telephone conversation with one of the parties, but did not identify the voice, and the court held it insufficient.[1]

[1] Murphy *v.* Jack, 142 N. Y. 215. Cf. Nebraska Nat. Bank *v.* Burke, 62 N. W. Rep. 452.

CHAPTER XXX.

CONTRACT BY TELEGRAM, AND OTHER MATTERS.

§ 681. Contract by Telegram. When Complete.
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683. Illinois Case.
684. Mistake in Terms. English Rule.
685. Mistake in Terms. United States Rule.
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698. Use of Telegram in Legal Proceedings.
699. Statutes on this Point.
700. Trademark of Telegraph Company.

§ 681. **Contract by Telegram. When complete.** — The question of the formation of contracts by telegram has received some consideration in several cases, and the courts have generally placed it upon the same ground as the formation of a contract by letter. The rule is that if a party makes an offer by telegraph, he authorizes a reply thereto by the same agency, thus constituting the telegraph company his agent for making the offer to the party to whom it is made, and for receiving his reply, and the delivery of the reply telegram to the telegraph company for transmission to the offerer completes the contract; and for the same reason a retraction of the offer must reach the person to whom the offer is made before he has given his acceptance to the telegraph company, in order to be an effectual retraction.[1]

[1] Stevenson *v.* McLean, 5 Q. B. Div. 346; Minnesota Oil Co. *v.* Collier Lead Co., 4 Dill. U. S. 431; Trevor *v.* Wood, 36 N. Y. 307. Cf. Baker *v.* Holt, 56 Wisc. 100; Perry *v.* Mount Hope Iron Co., 5 Atl. Rep. 632; Haas *v.* Myers, 111 Ill. 421.

§ 682. **Instances of Contract by Telegram.** — Thus in a case where the defendant had made an offer by letter to the plaintiff to sell iron at a certain price, and the plaintiff telegraphed back an inquiry as to different terms of sale, and the defendant then telegraphed that he had sold the iron to another party, but before his telegram reached the plaintiff, he, in his turn, had telegraphed accepting the terms made in the letter; the court held that the plaintiff's first telegram was a mere inquiry, and did not affect the offer contained in the letter, and that his acceptance telegram being sent before he received the telegram retracting the offer, formed a contract binding on the parties.[1] It is to be noticed in this case that the original offer was made by letter and not by telegraph, and the case is therefore stronger on this point than when the original offer is made by telegram, as was the case in Minnesota Oil Company *v.* Collier Lead Company.[2] In this latter case the court confirmed the rule as stated above, but held that in that particular case, where the offer was to sell oil, since the offer related to a subject-matter which fluctuated violently in price, the offer in its nature required an immediate acceptance, and that the delay of the accepting company was so great that the offer must be considered to have lapsed by its own terms before the telegram of acceptance was sent. The court, however, said that the delivery of the acceptance telegram to the telegraph company for transmission would have completed the contract, if it had been delivered in time.

§ 683. **Illinois Case.** — In a case in Illinois[3] the court again affirmed the rule that the delivery of the acceptance telegram to the telegraph company for transmission to the

[1] Stevenson *v.* McLean, 5 Q. B. Div. 516.

[2] *Supra.* If the letter is a mere circular of prices, a telegram taking a certain quantity has been held to be merely an offer, and not a binding contract. Moulton *v.* Kershaw, 59 Wisc. 316.

[3] Haas *v.* Myers, 111 Ill. 421.

offerer completes the contract, but this was an *obiter dictum*, as the court decided the case upon a wholly different principle. The facts in this case were that the plaintiff and the defendant had been discussing entering upon a certain scheme for the purchase and sale of cattle. The arrangement between them was that the defendant should go to the place where the cattle were, in a distant town, and investigate the advisability of the purchase, and the price. He was then to telegraph to the plaintiff, giving him the price and particulars, and asking him if he wished to join the venture, upon which the plaintiff was to telegraph yes or no, and the defendant was then to telegraph him again, giving him the amount necessary for him to deposit, which he was to do, and then the defendant could draw against it for part payment for the cattle. The defendant, accordingly went to the place of purchase, and after investigation telegraphed to the plaintiff, "Do you want Murphy's 45 at ranch? Answer." The plaintiff telegraphed an answer, "Yes, I will take third interest. Will leave for Billings to-night." This telegram was never delivered, but a subsequent telegram of the plaintiff as to the advisability of the purchase was delivered. The defendant, not hearing from the plaintiff, considered that he did not care to join the venture, and combining with another person, purchased the cattle and made a profit on the sale of them. The plaintiff brought a bill in equity to be declared a partner in the venture and for his share of the proceeds. The court held that under the circumstances of the case, the telegram of the defendant to the plaintiff required the receipt of the answer by the defendant before the arrangement between them was complete; that the parties, by their arrangement, had evidently contemplated that the possession of the information by the defendant of the plaintiff's willingness to join the venture was a condition precedent to his acquiring an interest therein, and the case was therefore

different from an ordinary offer by telegraph and telegraphic acceptance.[1]

§ 684. **Mistake in Terms. English Rule.** — If a mistake is made in the transmission of a telegram containing terms of an offer, and the offer is accepted in its erroneous form, the question arises as to the effect of this error upon the parties concerned in the transaction. In England it is held that neither the party employing the telegraph nor the telegraph company can be made liable for the error to the person who receives the message.[2] This rule is based upon the view that the telegraph company is not the agent of the sender to make the contract, but a mere forwarder of the despatch, and, therefore, if it forwards a despatch which he did not send there has been no meeting of the minds which makes the contract. The sender is therefore not liable on the erroneous offer, and for other reasons which have been discussed above,[3] the English courts hold the telegraph company not liable for the error.[4]

§ 685. **Mistake in Terms. United States Rule.** — In the United States the question is not definitely settled. As regards the telegraph company, the subject is discussed in preceding sections.[5] There have been no cases in which it has been definitely held in an action on the contract that the sender of the message is bound to the addressee by the contract as erroneously transmitted by the telegraph company and accepted by him.[6]

§ 686. **Binds Sender.** — In two cases, which were actions against the telegraph company for negligence in transmit-

[1] To the same effect, Lewis *v.* Browning, 130 Mass. 173.

[2] Playford *v.* United Kingdom Electric Telegraph Co., L. R. 4 Q. B. 706; Henkel *v.* Pape, 6 Ex. 7; Verdin *v.* Robertson, 10 Ct. of Sess. Cas. 35.

[3] *Supra*, §§ 460, 461.

[4] As to liability of an agent transmitting the offer as received by him by telegram, see *post*, § 688.

[5] *Supra*, §§ 460–473.

[6] Compare §§ 668, 669.

ting the messages,[1] the decisions have directly involved this point, for the measure of damages depended on the obligation of the sender to fulfil the contract as erroneously transmitted, and have been decided in favor of holding the sender bound by the erroneous contract. In both cases the action was by the sender of the message to recover damages for the loss he alleged he had suffered by being obliged to carry out the contract in the erroneous form in which it was transmitted by the telegraph company, and accepted by the person to whom it was made. The court in the Maine case says: —

§ 687. **Opinion in Ayer v. Western Union Telegraph Company.** — "It is evident that in case of an error in the transmission of a telegram, either the sender or receiver must often suffer loss. As between the two, upon whom should the loss fairly fall? Now much the safer and more equitable rule, and the rule the public can most easily adapt itself to, is that as between the sender and receiver, the party who selects the telegraph as the means of communication shall bear the loss caused by the errors of the telegraph. The first proposer can select one of many modes of communication, both for the proposal and the answer. The receiver has no such chance except as to his answer. If he cannot safely act upon the message he receives through the agency selected by the proposer, business must be seriously hampered and delayed."[2]

[1] Western Union Telegraph Co. *v.* Shotter, 71 Ga. 760; Ayer *v.* Western Union Telegraph Co., 79 Me. 493. Cf. *ante*, § 622.

[2] When a person telegraphs to another to telegraph money to a third person, and the money is so telegraphed, the person who sends the money cannot recover the same in an action of contract against the person to whom he telegraphs it upon a failure of the consideration therefor, for the loan which he makes is to the person who orders the money sent by telegraph, and not to the person to whom he sent the money. Thus where one being arrested, telegraphed to a friend in another city to send money by telegraph to his lawyer for the purpose of obtaining bail, and the money was so sent, and the arrested person was discharged in a *noi.*

§ 688. **Liability of Agent on Telegraphic Authority.** — If an agent, who receives his instructions by telegram, makes an offer to third parties based on the telegram, he is assumed to warrant his authority, and will be held liable personally if the telegram proves to be erroneous;[1] but if he signs the contract as agent "by telegraphic authority," he does not warrant his authority, and will not be held bound in case an error occurred in the transmission.[2]

§ 689. **Contract by Telegram, where made.** — A contract by telegram is made in the place from which the telegraphic offer is sent, and the rights and liabilities flowing from the contract depend upon the law of the State in which that place is.[3]

§ 690. **Telegram sufficient under the Statute of Frauds.** — A telegram is a sufficient writing under the statute of frauds when it is supplemented by proof of the authenticity of the signature to the original despatch as the handwriting of the one whom it is sought to hold.[4] Thus in a case where the plaintiff sued the defendant on an agreement to endorse the note of a third party, the plaintiff put in as evidence the copy of the telegram which he received from the telegraph company, without any proof of the loss of the original, or

pros. on the ground of insanity, the person who telegraphs the money cannot maintain an action against the person to whom he sent it, since his loan was to the person ordering it sent. Neither can he avoid his contract of loan with the person ordering the money on the ground of the insanity of the latter, for it is said by the Court, that a person, although insane, if he is not a raving madman or an idiot, is capable of an act, even if his act be voidable. The promise of an insane man is not absolutely void. Atwell *v.* Jenkins, 40 N. E. Rep. (Mass.) 178.

[1] Richie *v.* Bass., 15 La. An. 668.

[2] Lilly *v.* Smales, L. R. 1892, 1 Q. B. 456. Cf. *ante*, §§ 461, 469, 470.

[3] Tillinghast *v.* Boston, etc., Co., 39 S. Car. 484; Moore *v.* S. C. Forsaith Machine Co., Ib; Perry *v.* Mount Hope Iron Co., 5 Atl. Rep. 632.

[4] Rector Provision Co. *v.* Sauer, 69 Miss. 235; Dunning *v.* Roberts, 35 Barb. N. Y. 463; Smith *v.* Easton, 54 Md. 138; Little *v.* Dougherty, 11 Colo. 103. Compare *ante*, § 672.

any proof that the signature of the original was the handwriting of the defendant, or any other proof as to its authenticity. The facts were that the telegram put in evidence was sent in answer to one telegraphed to the defendant stating that the plaintiff was in the third party's office, and would attach the property of the third party if his debt was not secured. In reply a telegram was received by the plaintiff saying that the defendant would endorse the third party's note for three months. The court held that the evidence was not sufficient to connect the telegram received with the defendant, but that a telegram with satisfactory proof of its authenticity is an instrument in writing under the statute of frauds relating to a promise to guarantee the debt of another.[1]

§ 691. **Instances.** — In a case in New York the facts were that a third party ordered a bill of goods of the plaintiff's firm in another city. The firm, doubting his financial responsibility, refused to ship them. The defendant and one of the firm and a third party named Hall had some talk together about the matter of guaranteeing the responsibility of the party ordering the goods, in a room where there was a telegraph line; and finally a message was sent to the plaintiff as follows: "Will be responsible for the bill of goods ordered by X. yesterday." The goods were accordingly shipped, and X. did not pay for them. The plaintiff's firm therefore sought to hold the defendant on his telegram. The defendant maintained that he did not authorize the message as sent, but what he did authorize was a message guaranteeing the responsibility of Hall, but the court held that the proof showed that the operator who sent the message, and who was a relative of the defendant, was authorized by the defendant to act in the matter, and that his negligence in transmitting the message, therefore, affected and bound the defendant, and that the telegram was a sufficient writing under

[1] Smith *v.* Easton, 54 Md. 138.

the statute of frauds as the signature by the telegraph operator in the name of the defendant and in his presence and by his directions was, in effect, his signature.[1] But under a statute which enacts that false representations of financial solvency to be actionable must be in writing, a telegram containing such representations is not enough.[2]

In a case in Colorado it was held that a contract of employment by telegraph is in writing under the statute of frauds of that State.[3]

§ 692. **Lease by Telegram is Lease in Writing.** — Analogously to the foregoing rule, it is held that a valid lease or sale of real estate may be made by telegram, provided the proof shows that the telegram was signed by the party whom it is sought to hold, or by some one duly authorized by him.[4]

§ 693. **Statutory Confirmation of above Rule.** — The rule of the courts that telegrams are writings sufficient under the statute of frauds has been supplemented in several States by statutes which directly enact that telegrams shall be considered instruments in writing, or which authorize the transmission of written instruments by telegraph. Thus in Oregon, Washington, and Nevada it is provided by statute that whenever any notice, information, or intelligence, written or otherwise, is required to be given, the same may be given by telegraph, provided that the despatch containing the same be delivered to the person entitled thereto, or to his agent or attorney, and notice by telegraph shall be deemed actual notice.[5]

§ 694. **Record of Written Instruments.** — Furthermore, powers of attorney or other instruments in writing duly

[1] Dunning *v.* Roberts, 35 Barb. N. Y. 463.

[2] Weil *v.* Schwartz, 4 West. Rep. 772.

[3] Little *v.* Dougherty, 11 Colo. 103.

[4] Calhoun *v.* Atchison, 4 Bush, Ky. 261; Godwin *v.* Francis, 5 C. P. 295.

[5] Oregon, Hill's Annot. Stat. §§ 4168, 4169; Washington, Hill's Stats. & Codes, §§ 1552, 1553; Nevada, Gen. Stat. §§ 932, 933.

proved or acknowledged and certified so as to be entitled to record, may, together with the certificate of proof or acknowledgment, be sent by telegraph and the telegraphic copy or duplicate thereof shall, *prima facie*, have the same force and effect in all respects, and may be admitted to record and be recorded in the same manner with like effect as the original.[1]

§ 695. **Checks, Due Bills, Bills of Exchange, Promissory Notes.** — In the same States it is further provided that checks, due bills, bills of exchange, promissory notes, and all other orders and agreements for the payment and delivery of money, or other things of value, may be made or drawn by telegraph, and when so made or drawn, shall have the same force and effect to charge the maker, drawer, endorser, or acceptor thereof, and shall create the same rights and equities in favor of the payee, drawee, endorsee, acceptor, holder or bearer thereof, and shall be entitled to the same days of grace as if duly made or drawn and delivered in writing. But it shall not be lawful for any person other than the maker or drawer thereof, to cause any such instrument to be sent by telegraph so as to charge any person thereby. Whenever the genuineness or execution of any such instrument received by telegraph shall be denied on oath by the person sought to be charged thereby, it shall be incumbent upon the party claiming under or alleging the same to prove the existence and execution of the original writing from which the telegraphic copy or duplicate was transmitted. The message shall in all cases be preserved in the telegraph office from which the same is sent. Any instrument in writing duly certified by a notary public under his hand and official seal, or by a commissioner of deeds, or a clerk of a court of record, to be genuine within the personal knowledge of such officer, may, together with such

[1] Oregon, Hill's Annot. Stat. § 4170; Washington, Hill's Stats. & Codes, § 1554; Nevada, Gen. Stats. § 934.

certificate be sent by telegraph, and the telegraphic copy thereof shall, *prima facie* only, have the same force, effect, and validity in all respects whatsoever as the original, and the burden of proof shall rest with the party denying the genuineness or due execution of the original.[1] In the absence of statute, a bank is not bound to accept by telegram the checks or drafts of its depositors even though it has funds.[2]

§ 696. **Transmission of Seal by Telegraph.** — In the same States it is provided that whenever any document to be sent by telegraph bears a seal, either private or official, it shall not be necessary for the operator sending the same to telegraph any description of the seal, or any word or device thereon, but the same may be expressed in the telegraphic copy by the letters "L. S.," or by the word "Seal."[3]

§ 697. **Telegraphic Copy.** — The phrase "telegraphic copy" or "telegraphic duplicate," when used in these statutes, is to be construed to mean any copy of the message made or prepared for delivery at the office to which the message may have been sent by telegraph.[4]

§ 698. **Use of Telegram in Legal Proceedings.** — The telegraph, owing to its quickness of operation, is a valuable assistant in the enforcement of legal processes, and has been recognized as such in legal proceedings, in giving notice and carrying information, provided it is shown that the telegram was duly authorized by the sender, and it is properly proved in the case. Thus in England,[5] a person, having obtained an injunction against another to prevent a sheriff's

[1] Oregon, Hill's Annot. Stat. §§ 4171, 4172; Washington, Hill's Stats. & Codes, §§ 1555, 1556; Nevada, Gen. Stats. §§ 935, 936.

[2] Myers *v.* Union National Bank, 27 Ill. App. 254.

[3] Oregon, Hill's Annot. Stat. § 4174; Washington, Hill's Stats. & Codes, § 1559; Nevada, Gen. Stats. § 939.

[4] Oregon, Hill's Annot. Stat. § 4177; Washington, Hill's Stats. & Codes, § 1560.

[5] Bishop, *in re*, 13 Ch. Div. 110.

sale which was to take place that day, telegraphed to the sheriff's deputy, who was holding the sale, to stop it. The sheriff's deputy received the telegram, but paid no attention to it. It was sought to commit the other party for contempt. The court held that a notice of an injunction might be sent by telegraph, and if the party against whom the injunction is issued actually receives the telegram, and therefore the notice of the injunction, he will be committed for contempt if he disregards it, but that court will investigate, in each case, the fact of actual receipt of the message and its contents. It was also said that a person who procures an injunction to be served at a distant place should telegraph to a local solicitor, and get him to give notice to the parties interested, and that the sheriff's officer who receives such notice should telegraph to the bankruptcy offices or the chancery clerk's office in London, to see if such injunction has, in fact, issued.[1]

§ 699. **Statutes on this Point.** — In several States the legislatures, recognizing the advantage of communication by telegraph in suits at law, have enacted that writs, processes, etc., may be telegraphed from one point to another, and in such case the telegraphic copy may be considered as an original, and may be served or executed by an officer in the same manner as the original might be, if delivered to him.[2]

§ 700. **Trademark of Telegraph Company.** — In a few States statutes have been enacted which provide that the president or secretary of any telegraph company may file in the office of the county clerk in the county in which the principal office of the company within the State is situated, a copy of any printed blank or envelope, picture, or device, used or

[1] To similar effect, Bryant, *in re*, L. R. 4 Ch. Div. 98; Tonkinson *v.* Cartledge, 22 Alb. L. J. 123; Cape May, etc. R. R. Co. *v.* Johnson, 35 N. J. Eq. 422; Morgan *v.* People, 59 Ill. 58.

[2] Oregon, Hill's Annot. Stat. §§ 4169, 4170, 4172, 4173, 4174; Washington, Hill's Stats. & Codes, §§ 1553, 1554, 1556, 1557, 1558; Nevada, Gen. Stat. §§ 933, 934, 936, 937, 938.

intended to be used by said company, as a distinguishing mark, notice, or index to said business, and thereupon such blank, envelope, picture, or device shall become the property of the company, and it shall not be lawful for any person, unless by the employment or permission of said company, to print, publish, distribute or use, or cause to be printed, published, distributed or used, either of them, or any copy, counterfeit or imitation thereof, under a penalty of fine not exceeding $500 or imprisonment not exceeding six months.[1]

[1] Oregon, Hill's Annot. Stat. § 2009; Nevada, Gen. Stats. § 940; Cf. Street *v.* Union Bank, L. R. 30 Ch. Div. 156; Ager *v.* Penin. & Orient. St. Nav. Co. L. R. 26 Ch. Div. 637.

CHAPTER XXXI.

TELEPHONE AND ELECTRIC LIGHT OPERATION.

§ 701. Telephone Operation.
702. Telephone Company receiving Written Messages for Transmission.
703. Method of Business for Jury.
704. Other Rules of Telephone Operation.
705. Operation of Electric Light Lines.
706. Cutting out Lamp.
707. Trimming Lamp.
708. Suitable Appliances.
§ 709. Repair of Machinery.
710. Imperfect Apparatus.
711. Tapping Electric Light Wires.
712. Letting Contract for Street Lighting.
713. Power Station a Nuisance.
714. Insurance on Loss by Fire.
715. Electricity used in Capital Punishment.
716. People *v.* Durston.
717. Kemmler, *in re.*

§ 701. **Telephone Operation.** — It is obvious that telephone companies do not come under the same liabilities for negligence in the transmission or delivery of messages, as telegraph companies do, to parties who send messages over their lines according to the ordinary mode of using the lines, because in most cases the parties converse directly with each other, merely using the telephone lines as a means for this end. The telephone company, therefore, ordinarily incurs no liabilities when parties simply use its lines and instruments for their own conversations.[1] Whether or not the telephone company might be held liable if, owing to its negligence, its instruments or lines failed to work, and therefore prevented the transmission of messages, or rendered the sounds so confused that the recipient of the message heard it erroneously, is a question upon which no decision has been found. In one State a statute provides that a telephone company shall not be liable for errors in messages or communications, except where such messages or communications are transmitted under contract directly by the agents

[1] Southwestern Telegraph & Telephone Co. *v.* Dale, 27 S. W. Rep. 1059.

or employees of the company, nor shall it be liable for any special damages incurred by a failure of its instruments to work beyond a rebate of the rent charged for the time such instruments failed to work.[1] As the telephone is held to be a species of telegraph,[2] probably any damages which could be shown to result from the negligence of the telephone company, whereby its instruments were not in working order, would give a cause of action to the parties injured thereby.

§ 702. **Telephone Company receiving Written Messages for Transmission.** — If, however, a telephone company undertakes the business of receiving messages, either in writing or orally, to be transmitted by its employees over the lines, and delivered to the person for whom they are intended, either in writing or orally, by the employees of the company, thus assimilating its mode of operations to those of an ordinary telegraph company, it incurs the same liability for the negligence of its employees as a telegraph company does.[3]

§ 703. **Method of Business for Jury.** — The question of whether the company thus combines both methods of doing business, or whether in effect it does only a strict telephone business, is one of fact for the jury, unless there is no dispute as to the facts, and these are of such a nature as to admit of but one inference.[4] Thus in a case where the facts were that a company was organized for the purpose of carrying on both telegraph and telephone business, and in some places carried on both of these businesses, and in others, where it paralleled the Western Union Telegraph Company's lines, did only a telephone business, and in one of the latter places a written message was delivered to it for transmission, which its local operator received and transmitted,

[1] Ind. Ann. Stats. § 5526. [2] *Supra*, §§ 13–17.
[3] Southwestern Telegraph & Telephone Co. *v.* Dale, 27 S. W. Rep. 1059
[4] Ibid.

but which was never delivered at its destination; the court held that it was a question for the jury whether the company was, in fact, in that place, holding itself out to the public as transacting a telegraph business, and whether its agent had authority to receive such messages for transmission. An important fact in this case was a notice hung in the office to the effect that the company furnished facilities for personal communications, and that the assistance of the operators in sending such messages was only as a matter of convenience to the senders, and without responsibility to the company.[1]

§ 704. **Other Rules of Telephone Operation.** — Other rules affecting the operation of telephone companies have been already considered in discussing similar questions regarding the operation of telegraph companies. Such, for instance, are the rules regarding the furnishing of instruments to parties without discrimination and at usual rates. These matters were discussed at length in the chapter relating to discrimination.[2] With these exceptions, few cases have been found which bear upon the subject of the operation of telephone lines, nor does there seem to be a large field for development in the future, since the fact that the use of the lines is made by the individuals themselves will prevent any large number of cases against the company for negligence of its operators. Possibly cases may arise where the central office connects the wrong lines, and thus damage occurs to parties using the lines, or, as above indicated, the lack of repair of the instruments may lead to similar damage, in any of which cases probably the company will be held liable.

§ 705. **Operation of Electric Light Lines.** — The operation of electric light companies is governed by the same general principle which applies to telegraph companies, namely, that the company must not be negligent in the conduct of its

[1] Southwestern Telegraph & Telephone Co. *v.* Dale, 27 S. W. Rep. 1059.

[2] *Ante*, Chapter xiv.

business.[1] The application of this principle is mainly found in cases which have been already discussed in considering the construction and maintenance of electric lines, to wit, cases where employees of the company or third parties have been injured by the lack of repair or other negligent condition of the poles and lines of the company. Without repeating the former discussion, to which the reader is referred, it is sufficient to say that the electric light company is obliged to use due care in the maintenance and operation of its lines and machinery, and is liable to third parties for its negligence in this respect, and also to its employees, under the usual restrictions as to the assumption of the risks applicable to the relations of master and servant.[2] In addition to the cases discussed in the sections referred to, a few instances of cases where electric light companies have been held liable for negligence in operation are given in the following sections.

§ 706. **Cutting out Lamp.** — In a case in Colorado,[3] the facts were that the plaintiff was in the employ of the electric light company as carpenter, his duties being to take care of the electric light poles. He was, however, ordered by the manager of the company, about half past three in the afternoon, to go to a certain pole, to take out the lamp and reconnect the wires, and bring the lamp back. This was outside the usual scope of his duties, and he was unfamiliar with such matters. The evidence was that the current was generally turned on about half past four in the afternoon, or later; that the employee went straight to the place indicated,

[1] *Supra*, §§ 235–259, 266–272.

[2] *Supra*, §§ 235–259, 266–272; Colorado Electric Co. *v.* Lubbers, 11 Col. 505; Kraatz *v.* Brush Electric Light Co., 82 Mich. 457; Illingsworth *v.* Boston Electric Light Co., 161 Mass. 583; Piedmont Electric Illuminating Co. *v.* Patteson, 84 Va. 747; Weiden *v.* Brush Electric Light Co., 73 Mich. 268; Jenney Electric Co. *v.* Murphy, 115 Ind. 566; Yates *v.* Southwestern Brush Electric Light & Power Co., 40 La. An. 467.

[3] Colorado Electric Co. *v.* Lubbers, 11 Col. 505.

which would ordinarily take him about half an hour, and on his arrival proceeded to take out the lamp, and was injured by the electric current. The court held that there was sufficient evidence of negligence of the company to allow the case to go to the jury.

§ 707. **Trimming Lamp.** — In a case in Michigan,[1] an employee of the electric light company was sent out to trim one of the lamps. It was shown that the circuit on which the lamp in question was hung was for a long distance supported on the same poles with a day circuit, and at places the wires had sagged so as to cross, and also that the insulation was worn off in places on both sets of wires. The current was turned on the day circuit all day, and the plaintiff contended that it was diverted from the day circuit to the night circuit by this sagging and crossing of the wires. The defendant contended that as there was no evidence of the crossing of the wires at any particular place at which the insulation was defective, the jury could not find that this crossing or sagging was the cause of the accident, but the court held that there was sufficient evidence to go to the jury.[2]

§ 708. **Suitable Appliances.** — The electric company must also provide its employees with suitable appliances for repairing the lines if it orders them to attend to such duties. Thus, in a case in Virginia the facts were that a lineman of the electric light company was killed while repairing a break in the circuit. The break was discovered about lighting-up time, and the employees were sent out from the station to search the circuit to see where the break was. Each man took a shunt cord, which is a device for cutting out a lamp while the repairs are being made, each end of the shunt cord being attached to the circuit wire on different sides of the lamp in question, so that the current is diverted

[1] Kraatz *v.* Brush Electric Light Co., 82 Mich. 457.

[2] Cf. Sullivan *v.* Boston & Albany R. R. Co., 156 Mass. 378.

from the lamp over the shunt cord, the employee then inspecting the lamp to see that the connections are perfect. The shunt cord which the lineman in question took from the lighting station was defectively insulated, and the inference from the facts was that he must have grasped it in some way so as to bring himself into the circuit. The evidence showed that all the shunt cords were in the process of repair by the electricians at the office of the company, and that this one in particular had not been finished, but was left with the others, and was taken by the lineman in question without any objection on his part. The court held that this taking by the lineman of the defective shunt cord was contributory negligence, as the defect was patent, and set aside a verdict in behalf of his administratrix.[1]

§ 709. **Repair of Machinery.** — Similarly an electric light company is bound to keep its machinery and apparatus of all kinds in reasonable repair. Thus, where an electric light company had a large tower in a square upon which its electric light was placed, and inside the tower was an elevator on which the linemen pulled themselves up to repair the lamps, it was held that this elevator was part of the apparatus of the company, and must be kept in repair by it.[2] The facts in this case were that the plaintiff was in the employ of the electric light company, and was sent out with the foreman to trim lamps. The lamp in question was in a large tower near the post-office corner in Chicago. To reach the lamp it was necessary to ascend in an elevator inside the tower. This elevator was pulled up by hand. The plaintiff contended that the elevator cable had become frayed and rotten, and for that reason broke. He also contended that after the foreman had ordered him to ascend the tower, another lineman near by said that that lamp had been trimmed, whereupon the foreman said, "Go up anyway."

[1] Piedmont Electric Illuminating Co. *v.* Patteson, 84 Va. 747.

[2] Weiden *v.* Brush Electric Light Co., 73 Mich. 268.

The foreman testified, however, that when the lineman said the lamp was trimmed, the plaintiff said, "Better go anyway," and he, the foreman, acquiesced in this, saying, "Yes, better go anyway." The elevator car then ascended with the above-mentioned result. The court held that whether the plaintiff went up in the elevator at the express command of the foreman, or in the performance of his ordinary duties as lamp-trimmer, he was in the employ of the company, and in the performance of his duty, and the defect in the apparatus not being patent, the company was held liable for its negligence.

§ 710. **Imperfect Apparatus.** — In a case in Indiana the injury to an employee occurred as follows. Plaintiff was in the employ of an electric light company, and was directed by the foreman to repair some wires in the Hotel Jefferson. He took for this purpose a ladder belonging to the company, one side of which was broken off just above the top round. He placed this ladder against the wall, and proceeded to repair the wires in question. While so doing, the upper end of the ladder slipped under the top sill of a doorway and threw the plaintiff on the ground, injuring him. Plaintiff brought suit, and the court held that he could not recover; that although the company furnished him with imperfect apparatus, yet the imperfection was such as was patent, and a person of ordinary intelligence should have either refused to use the apparatus, or should have used it in such a manner as would prevent injury from it.[1]

§ 711. **Tapping Electric Light Wires.** — A method of surreptitiously obtaining electric light has been found to have been practised in some instances, by connecting wires to the lines of the company without authority, and thus tapping the current and using the current thus stolen for lighting or power purposes. To prevent this, in two States statutes have been passed providing that any person who taps or connects

[1] Jenney Electric Co. *v.* Murphy, 115 Ind. 566.

with any electrical apparatus, or with any electric light wire, for the purpose of obtaining an electric current for light, power, or heat, or for any other purpose whatever, without the knowledge and consent of the owner thereof, or the person or persons or corporation operating the apparatus, appliances, pipes or wires, or who maliciously tampers with or injures any such apparatus, pipes, or wires, is guilty of a misdemeanor punishable by fine or imprisonment.[1] Similar statutes relating to telegraph lines have been previously referred to, and in some instances are made applicable to other kinds of electric wires.[2]

§ 712. **Letting Contract for Street Lighting.** — In California, statutes require that "in all street work and in furnishing any supplies and materials for the same, when the expenditure required for the same exceeds $100, the work shall be done by contract, and shall be let to the most responsible bidder, after notice and publication in a newspaper of general circulation." It has been held that the lighting of the streets by electricity is not "street work" within the meaning of this statute, and that the city cannot refuse to pay for the electric lighting after having the benefit thereof, on the ground that the contract for this lighting was unauthorized. The court says that "street work" in this statute has the ordinary meaning of making and repairing the streets.[3]

§ 713. **Power Station a Nuisance.** — The operation of an electric light and power station, involving as it does the continuous motion of steam engines and dynamos, with the constant jar and shock necessarily incident to such heavy machinery, and the smoke and soot accompanying the col-

[1] Col. Stats. 1893, ch. 65; Mass. Stats. 1895, c. 330.

[2] See note at end of Chapter ix. In Massachusetts, a statute provides that in case a person who takes electric light does not pay therefor, the company may cut off the light, just as a gas company may do. Acts 1894, c. 316.

[3] Electric Light & Power Co. *v.* San Bernadino, 100 Cal. 351.

lection of the steam to operate them, is unquestionably, in many cases, as a matter of fact, a nuisance to the neighborhood. It seems, however, that it is a nuisance for which there is no legal redress, provided the business is carried on with as little annoyance to the neighborhood as improved machinery and methods can effect.

Thus in a case in Alabama, one of the neighbors brought a bill in equity to enjoin an electric light and motor company from operating its power station, complaining that the plant caused great annoyance from the smoke, soot, noise, and vibrations. The defendant put in evidence showing that the plant was of great public utility, that the machinery was of the best quality, that the officers and agents were skilful, and that the annoyances of the plant had been much lessened from time to time with the progress of the experience in running the plant. The court held that the evidence did not prove more annoyance than is usually experienced by residents in cities, and that there was nothing for which redress could be obtained at law.[1]

§ 714. **Insurance on Loss by Fire.** — The obvious danger of fire in an electric lighting plant has been the cause of some question as to whether an ordinary fire policy covers this risk. It has been decided in a case in Massachusetts,[2] that when a fire in an electric lighting station causes a short circuit of the apparatus while it is in operation, and the effect of this short circuit is to disrupt the electric generating machinery, and damage the building and other machinery by the fragments thereof, the damage is covered by a fire policy, the court saying, "The active, efficient cause that sets in motion a train of events which brings about a result without the intervention of force started and working actively from a new and independent source, is the direct and proximate cause of the damage."

[1] English *v.* Progress El. Light & Motor Co., 95 Ala. 259.

[2] Lynn Gas & Electric Co. *v.* Meriden Fire Ins. Co., 158 Mass. 570.

§ 715. **Electricity used in Capital Punishment.** — The use of electricity for executing the death penalty upon convicts is performed by means of a current of high tension and consequent fatality to life. The use of electricity for the execution of criminals has been instituted by law in one State, New York, and the question of the constitutionality of a statute prescribing this mode of execution has been raised and thoroughly discussed and settled in the affirmative. The statute is as follows: "The punishment of death must, in every case, be inflicted by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death, and the application of such current must be continued until such convict is dead."[1] This statute was discussed in People *v.* Durston.[2]

§ 716. **People v. Durston.** — This was a case of *habeas corpus* against the warden of the state prison in New York for detaining in custody one Kemmler, who had been convicted of murder and sentenced to death by electricity. This sentence being the first of the kind in New York State, and being imposed under the then recent statute, this proceeding was intended to test the legality of the sentence. The point specially involved was the constitutionality of the statute introducing punishment by electrocution, when considered in reference to the clause of the constitution forbidding cruel and unusual punishments. The court goes thoroughly into the history of the clause in the constitution showing that it was originally little more than a declaration of the rights of the subject in England as against the king, and then proceeds to show that the introduction of electrocution in New York State was the result of a thorough investigation by a commission into the most humane form of inflicting the death penalty, and that the result of these investigations was that the commission concluded that death

[1] 1 N. Y. Rev. Stat. Birdseye, page 821, § 15.
[2] 119 N. Y. 569.

by electricity was the most humane method of inflicting the death penalty, and that the decision of the legislature enacting the statute is conclusive that this method of execution is neither cruel nor unusual. The same point was discussed slightly in People *v.* Kemmler,[1] but the court in that case say that they do not discuss it thoroughly, as it was to be examined fully in People *v.* Durston just cited.

§ 717. **Kemmler, in re.** — The same convict attempted to bring the same question before the Supreme Court of the United States by a writ of error sued out from the Supreme Court of the United States to test the question of whether such a mode of execution was repugnant to the Constitution of the United States. The application for such a writ was denied, for the Supreme Court of the United States were of the opinion that it was apparent upon the face of the record that the issue of the writ could only result in the affirmance of the judgment, and held that the statute of New York, above quoted,[2] was not repugnant to the Constitution of the United States when applied to a convict who committed the crime for which he was convicted, after the act took effect.[3]

[1] 119 N. Y. 580.

[2] Laws of 1888, c. 489.

[3] *In re* Kemmler, 136 U. S. 436. Cf. *ex parte* Mirzan, 119 U. S. 584.

CHAPTER XXXII.

ELECTRIC RAILWAY OPERATION.

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§ 718. **General View.** — The rules of law which govern the operation of electric railways cannot be said as yet to be developed to their full extent, on account of the

comparatively short time since these railways have come into existence. There have, however, been many cases decided already on various points relating to such operation, and these cases will be considered in the following sections.

§ 719. **Position of Electric Railway.** — As to operation, the legal position of the electric railway resembles in many particulars the horse railway, while in others it resembles the steam railway. The cases which have been decided as to the operation of electric railways may be divided into three classes: first, those relating to passengers on the cars; second, those relating to travellers in the highway; third, those relating to employees of the company.

§ 720. **Duty to Passengers.** — The duty and liability of an electric railway company to its passengers is based upon its duty to use care in the operation of its cars, and it is said in several cases, that electric railway companies, like steam railway companies, in view of the danger of the vehicles operated by them, are obliged to use a very high degree of care, or, as it is sometimes put, the highest possible degree of care and skill, or all that human care, vigilance, and foresight reasonably can do, to prevent injury to the passengers, and is liable for the slightest negligence in operation.[1] A street railway company, however, does not insure the safety of its passengers as a common carrier does the safe transportation of property. It is bound to use such care as the dangers of its method of operation may require, and this care, in the case of electric cars, should be a high degree of care, since the ordinary care which a prudent man would use in operating so dangerous a method of transportation

[1] Elliott *v.* Newport Street Railway Co., 28 Atl. Rep. 338; Buck *v.* People's Street Railway, Electric Light and Power Co., 46 Mo. App. 555; Shankenbery *v.* Metropolitan Street Railway Co., 46 Fed. Rep. 177; Pray *v.* Omaha Street Railway Co., 62 N. W. Rep. 447; Schepers *v.* Union Depot R. R. Co., 29 S. W. Rep. 712; Cohen *v.* West Chicago Street Railway Co., 60 Fed. Rep. 702.

would be much greater than in case of such comparatively harmless vehicles as cars drawn by animals.[1]

§ 721. **Due Care and Contributory Negligence.** — The cases which involve accidents occurring by reason of the operation of electric railways almost invariably raise two questions. First, the alleged negligence of the railway company, and second, the alleged contributory negligence of the plaintiff. These two questions generally arise upon the same facts, and are then so intimately connected that it is difficult to separate them. In the following sections, therefore, it has been thought best to take up several frequently recurring kinds of accidents and discuss both of these questions together.

§ 722. **A Person becomes a Passenger, when.** — A difference exists between the time when a person becomes and ceases to be a passenger in a street railway company's car, and in that of a steam railway company. In the case of a steam railway car, since the company has control of the station and approaches, and can and must keep them in proper condition, it is justly held that a person intending to take passage upon or to leave a train has the relation and rights of a passenger in approaching or leaving the cars at a station. But a street railway company has no such control of the approaches to its cars, and a person is not a passenger before he has stepped upon a car or after he has stepped from it.[2] Therefore it has been held that where a person alighted from an electric car, and was struck immediately by another car going on the other track in the opposite direction, and killed, his administrator could not recover for this killing as if the deceased had been a passenger on the car.[3]

[1] Dallas Rapid Transit Railway Co. *v.* Dunlap, 26 S. W. Rep. 877. Compare sections on the care to be used by telegraph companies. *ante*, § 382 *et seq.*

[2] Creamer *v.* West End Street Railway Co., 156 Mass. 322; Schepers *v.* Union Depot Railway Co., 29 S. W. Rep. 712; Bigelow *v.* West End Street Railway Co., 161 Mass. 393.

[3] Creamer *v.* West End Street Railway Co., *supra.*

§ 723. **Stopping for Passenger to get on or off.** — Street car companies, in the prosecution of their duties as common carriers of passengers, are obliged to stop a reasonable time to allow passengers to get on or off the cars, the question of a reasonable time being in every case for the jury.[1] Therefore if a passenger attempts to get on or off a car, and is injured by the car starting suddenly, the question, so far as the railway company is concerned, is whether the car stopped sufficiently long for the passenger to get on or off under all the circumstances of the case.[2] And even if the car has stopped a reasonable time, yet if the employee of the company managing the car sees, or ought in the exercise of reasonable care to have seen, that a passenger is still in the act of getting on or off, it is negligence on the part of the car company to start the car suddenly.[3] But if the car stops long enough for the passenger to get on or off, and he neglects to do so, and attempts to get on or off after the car has started, there is no negligence on the part of the company if the conductor or motorman did not see him thus trying so to do, or might not have seen him by the exercise of reasonable observation.[4]

§ 724. **Getting on or off Car in Motion Contributory Negli-**

[1] Demond *v.* Brooklyn City Railway Co., 8 Misc. Rep 610; Commerford *v.* Atlantic Avenue Railway Co., 8 Misc. Rep. N. Y. 599; Jackson *v.* Grand Avenue Railway Co, 118 Mo. 199; Joliet Street Railway Co. *v.* Duggan, 45 Ill. App. 450; Buck *v.* People's Street Railway, Electric Light & Power Co., 46 Mo. App. 555; Cohen *v.* West Chicago Street Railway Co., 60 Fed. Rep. 698; Cooper *v.* St. Paul City Railway Co., 54 Minn. 379.

[2] Jackson *v.* Grand Avenue Railway Co., 118 Mo. 199, 224; Cooper *v.* St. Paul City Railway Co., 54 Minn. 379; Cohen *v.* West Chicago Street Railway Co., 60 Fed. Rep. 698; Joliet Street Railway Co. *v.* Duggan, 45 Ill. App. 450.

[3] Cohen *v.* West Chicago Street Railway Co., 60 Fed. Rep. 698; Joliet Street Railway Co. *v.* Duggan, 45 Ill. App. 450; Omaha Street Railway Co. *v.* Craig, 39 Neb. 601; Jackson *v.* Grand Avenue Railway Co., 118 Mo. 199.

[4] Augusta Railway Co. *v.* Glover, 92 Ga. 132.

gence. — Whether a passenger is guilty of contributory negligence if he attempts to get on or off an electric car while it is in motion is a question of fact for the jury, and it is not like the case of boarding a steam car while in motion, which is held to be negligence *per se*. The question of whether the electric car was going at such a rate of speed as to make an attempt to get on or off contributory negligence under all the circumstances of the case, must be decided by the jury,[1] and the speed of the car must be proved, for the courts will not take judicial notice that electric cars move at a dangerously high speed.[2]

The rule has been stated in a Pennsylvania court as follows: If the car was in motion, and was not in that condition of motion which would induce any reasonable man to get on, then a person who gets on and is injured in so doing cannot recover.[3] If the evidence shows that getting on or off the car at such a time was clearly negligent, a verdict will be ordered for the defendant. Thus where a passenger upon an electric car, intending to stop at a cross street, got off while the car was slowing up, but before it actually stopped, and was killed by another car which was coming on the other track in the opposite direction, which latter car was going at a speed of fifteen or twenty miles an hour, and was lighted and crowded with people, and the gong was ringing, and passengers were shouting, singing, and making a good deal of noise, and the street was straight, and there was nothing except the passengers in front of the deceased as he sat in his seat to obstruct his view of the approaching car before he left his seat, and nothing after he rose to leave the car, it was held that the facts showed that he was negli-

[1] Corlin *v.* West End Street Railway Co., 154 Mass. 198; Schepers *v.* Union Depot Railway Co., 29 S. W. Rep. 712. But see Joliet Street Railway Co. *v.* Duggan, 45 Ill. App. 451.

[2] Corlin *v.* West End Street Railway Co., *supra*.

[3] Walters *v.* Philadelphia Traction Co., 161 Pa. St. 36.

gent, and that the court should direct the jury to return a verdict for the defendant, since the undisputed evidence of the plaintiff showed a course of conduct in the deceased which was inconsistent with any theory of due care on his part. The court expressly stated in this case that it did not intend to hold as a matter of law that it is negligence for one to leave a street car while it is in motion, but that such an act is not evidence of due care, nor was there any evidence showing the exercise of due care in the testimony relating to the actions of the deceased.[1] It should be noted that in this State the burden of proof of due care is on the plaintiff. If a passenger, attempting to get off a street car, pulls the bell instead of signalling the conductor, he takes upon himself risks of the misunderstanding by the motorman. Thus, where a lady, wishing to alight from a car, pulled the bell for stopping, and as the car did not stop quickly enough, pulled it again, and then got off, it was held that the motorman, mistaking the second ring for a signal to go ahead and starting the car suddenly, and thereby throwing the passenger to the ground and injuring her, did not constitute negligence on the part of the railway company, or at least was so far produced by the negligence of the passenger as to prevent her from recovering.[2]

§ 725. **Evidence of Due Care.** — In States where the burden of proof of due care is on the plaintiff, if the plaintiff shows in a general way his own conduct to have been in the usual line of careful conduct as to the boarding of the car, and also shows in a general way the conduct of the driver and the motion of the car at or before the time of the accident, he need not go into particulars if the evidence is such that the jury might properly find from his testimony that he was acting as a man of ordinary prudence would act in getting on the car. The absence of evidence of the particulars

[1] Creamer *v.* West End Street Railway Co., 156 Mass. 320.

[2] Sirk *v.* Marion Street Railway Co., 39 N. E. Rep. 421.

of a plaintiff's conduct is not fatal to his recovery where the negligence of the defendant is shown, and where it appears in general that the plaintiff was in the line of his duty in a place where no particular act of precaution was required, and where it does not appear affirmatively that he was guilty of any special act of negligence. In such a case the jury may legally infer that he was ordinarily careful.[1] So if the evidence shows that the plaintiff was getting on an electric car by the front platform along with others, and the motorman told him to get off and get on the rear platform, but just as he was getting off the motorman started up the car suddenly, and threw him to the ground, this is proof of negligence on the part of the company, and sufficient evidence of due care on the part of the plaintiff to allow the jury to render a verdict in his favor.[2]

§ 726. **Safe Landing Places.** — The question whether the place where the car stops for a passenger to alight is reasonably safe, and whether the plaintiff is exercising due care in alighting there, is for the jury.[3] The street railway company is obliged to use the streets for its landing places, and therefore cannot insure against defects therein, and the passenger must look out and see if the place is safe. Therefore, ordinarily, there is no liability if, in the daytime, the car is stopped in a bad place for landing.[4] But if the car stops at night in a place known to the conductor or driver to be bad, and not so known to the passenger, the jury may find that

[1] Corlin *v.* West End Street Railway Co., 154 Mass. 197; Cooper *v.* St. Paul City Railway Co., 54 Minn. 384; Buck *v.* People's Street Railway, Electric Light & Power Co., 46 Mo. App. 555. Cf. Creamer *v.* West End Street Railway Co., 156 Mass. 320.

[2] Slaughter *v.* Metropolitan Street Railway Co., 116 Mo. 269.

[3] Bigelow *v.* West End Street Railway Co., 161 Mass. 393.

[4] Creamer *v.* West End Street Railway Co., 156 Mass. 320; Bigelow *v.* West End Street Railway Co., 161 Mass. 393. But in Augusta Railway Co. *v.* Glover, 92 Ga. 132, it is said that the Railway Co. must *select* good places for landing.

this is negligence in the company.[1] There are opposing decisions as to whether, if a car stops to let off a passenger just as another car is coming in the opposite direction, and thereby the passenger is hurt, this is negligence of the company. That it is not, is held in Creamer *v.* West End Street Railway Company;[2] that it is, in Augusta Railway Company *v.* Glover.[3]

§ 727. **Riding on Platform of Electric Car is not, as a Matter of Law, Negligence.** — The question whether, under the circumstances, the plaintiff was justified in riding on the platform or step of a car, or the running board of an open car, or whether he should have been inside the car, is a question of fact for the jury, which they can decide upon all the evidence in the case.[4] Riding on the platform of a steam car is held to be sufficient evidence *per se* of contributory negligence to prevent the plaintiff from recovering, but this rule does not apply to electric cars nor to horse cars, the reason for the distinction being that the steam car is propelled or driven by a great force, with a tremendous power of steam, and is, or may be, driven at a very high rate of speed; and the danger attending the employment of great power, great forces, and moving at great speed, is greater than when the vehicle is propelled at a less speed.[5] If the car is so crowded that riding on the step or platform is a necessity, there can be no negligence imputed to the plaintiff, but

[1] Richmond City Railway Co. *v.* Scott, 86 Va. 902.

[2] 156 Mass. 320. In this case, however, the negligence of the passenger contributed. See § 724.

[3] 92 Ga. 132.

[4] Beal *v.* Lowell & Dracut Street Railway Co., 157 Mass. 444; Marion Street Railway Co. *v.* Shaffer, 36 N. E. Rep. 861; Elliott *v.* Newport Street Railway Co., 28 Atl. Rep. 338; Pray *v.* Omaha Street Railway Co., 62 N. W. Rep. 447; Fox *v.* Brooklyn City Railway Co., 7 Misc. Rep. N. Y. 285.

[5] Cases *supra;* Beal *v.* Lowell & Dracut Street Railway Co., 157 Mass. 444.

whether the car is so crowded is for the jury.[1] Whether a man standing upon the platform of a street car propelled by electricity when there is room inside, and seats, is to be held guilty of a want of due care, is a question for the jury, the question being, — Would a prudent man, a man using ordinary prudence and care, seeing a seat on the inside of a car where he might sit and be safe, still stand upon the front platform of a car driven by electricity?[2] It has also been held that the question of whether the railway company is negligent in allowing such crowds on a car as to render standing on platforms necessary, is for the jury.[3]

§ 728. **Standing on Platform against Rules.** — A street railway company has authority to make reasonable rules and regulations for the conduct of passengers on its cars, among which may be a rule that passengers shall not stand upon the platforms, and if passengers persist in breaking this rule when there is room enough for them inside, the conductor may compel them to leave the car. Thus, where several passengers boarded a street railway car, the seats of which were all occupied, but which had sufficient standing-room inside, and the passengers so boarding refused to go inside, although requested several times so to do by the conductor, in accordance with the rules of the road, it was held that he was justified in stopping the car and telling them to leave it, and waiting until they did so, and that a passenger thus expelled from the car could not recover damages for this expulsion, as he had wantonly refused to obey the rules of the company.[4]

§ 729. **Standing on Steps of Platform.** — It is evidence of negligence for a passenger on a street railway car to stand

[1] Pray *v.* Omaha Street Railway Co., 62 N. W. Rep. 418; Marion Street Railway Co. *v.* Shaffer, *supra.*

[2] Beal *v.* Lowell & Dracut Street Railway Co., 157 Mass. 444. Cf. *post*, § 729.

[3] Pray *v.* Omaha Street Railway Co., 62 N. W. Rep. 417.

[4] Fort Clark Street Railway Co. *v.* Ebaugh, 49 Ill. App. 582.

on the steps of the platform of the car when there is room enough inside for him to stand there.[1] But it is a question of fact for the jury whether there was sufficient room inside,[2] as well as whether it is negligence for the company to allow such crowds to be on the car as render standing on the steps necessary;[3] and the person standing on the steps, since he is riding in a dangerous position, is bound to use extra care, to look out for the dangers peculiar to his position, such as injury from passing vehicles, and being thrown off by swaying and jolting of the car; but he is not bound to look out for side posts of the railway supporting the trolley wire unless he knows they are dangerously near the track.[4] It is not negligence *per se* for a passenger in a street railway car operated by electricity according to the "trolley" system, to rest her arm upon the sill of an open window.[5]

§ 730. **Poles too near the Track.** — Accidents have sometimes occurred by reason of the posts or poles which support the cross wires or brackets from which the trolley wire is suspended, being so near the track that persons standing on the running-board of open cars or on the platforms of closed cars hit the posts if they lean outward from the car. In a case of this sort the whole question is one of fact for the jury, as to whether the construction is faulty or not; and whether the person injured was in the exercise of due care or not.[6] It has been held in such a case that in any event the city which granted the franchise of setting the poles in the street is not liable for the accident, on the ground that the city did not fix the position of the poles, and that the passenger on an electric car is in such case injured by the faulty construction of the railway system on which he is

[1] Francisco *v.* Troy & L. R. R. Co., 78 Hun, 13.
[2] Pray *v.* Omaha Street Railway Co., 62 N. W. Rep. 447.
[3] Ibid.
[4] Elliott *v.* Newport Street Railway Co., 28 Atl. Rep. 338.
[5] Schneider *v.* New Orleans & C. R. R., 54 Fed. Rep. 466.
[6] Elliott *v.* Newport Street Railway Co., 28 Atl. Rep. 338.

travelling as much as if he were injured by some defect in the electric machinery of the car.[1] Therefore it has been held, in an action against the street railway company, that where a passenger was standing on the running-board of an open car, and was hit by one of the side-posts supporting the overhead wire, said post being ten and one-half inches from the running-board, and there had been no warning from the conductor or objection to his riding there, the case might go to the jury on the question of negligence of the company and of the plaintiff, even though it was shown that the passenger might have stood between the seats of the car.[2] In further proceedings in this case, the court held that it was not contributory negligence for the person on the foot-board not to look out for the side-posts unless he knew they were close to the track, or heard the conductor's warning.[3]

§ 731. **Chains on Cars.** — If a street railway company has chains on the sides of its open cars to prevent passengers getting on and off when the cars are full, and these chains are down while the car is stopped, on the side next to the other track of the railway company, this is an invitation from the railway company to passengers to alight on that side, and if a passenger so alighting is struck by a car coming on that track, it is a question for the jury as to the negligence of the company.[4]

§ 732. **Conductor assisting Passenger to alight.** — There is no duty upon the conductor of a car to assist passengers to alight unless some patent weakness or inability on their part exists, which he has noticed or should have noticed with reasonable care.[5]

[1] Kennedy *v.* Lansing, 99 Mich. 518. Cf. *ante*, § 237, and see chapter on construction.

[2] Elliott *v.* Newport Street Railway Co., 28 Atl. Rep. 338. Cf. *ante*, §§ 727, 729.

[3] Elliott *v.* Newport Street Railway Co., R. I. 31 Atl. Rep. 694.

[4] Gaffney *v.* Brooklyn City Railway Co., 25 N. Y. Suppl. 996.

[5] Jarmy *v.* Duluth Street Railway Co., 55 Minn. 271.

§ 733. **Defective Insulation, Receiving Shock from Dashboard.** — If a passenger on an electric car, standing on the front platform, receives an electric shock from the handle of the dashboard which he has hold of to steady himself, the company may be liable therefor, the question being one of negligence for the jury. As the company is bound to keep its machinery in repair, and as the charging of the dashboard with electricity would probably happen from a lack of repair of the electric apparatus, the electric condition of the dashboard raises a *prima facie* case of negligence against the company. The question of whether the passenger is guilty of contributory negligence in standing on the platform depends upon the usual considerations relating to this subject.[1]

§ 734. **Driving Car against Wagon.** — When the motorman of an electric car drove his car against a wagon standing on the track, and threw the plaintiff who was standing on the platform of the car, to the ground, thereby causing him injury, it was held that this was evidence of negligence of the street railway company for which the plaintiff might recover.[2]

§ 735. **Crossing Steam Railway.** — When a street car in crossing a steam railway track is run into by a steam train, a passenger in the street car who is injured thereby may sue both companies, if both are in fault, or either of them alone, as the facts may indicate. When an electric car is about to cross a steam track, the question whether the conductor of the car is acting with due care if he simply goes upon one of the tracks of the steam railway company to look for trains and comes back to his car, or whether he should go across both tracks, is a question for the jury.[3] If the negligence of the motorman in crossing a steam railway track puts the car and its passengers in apparent peril of a

[1] Peyser *v.* Coney Is. & B. Railroad Co., 30 N. Y. Suppl. 610; § 727.
[2] Fox *v.* Brooklyn City Railway Co., 7 Misc. Rep. N. Y. 285.
[3] Douglas *v.* Sioux City Street Railway Co., 58 N. W. Rep. 1070.

collision, this may justify them in actions which result in their injury, and for which the railway company is liable.[1] Thus where a motorman, seeing the approach of an engine, but believing that his car could cross the track before the engine reached it, kept on his way and crossed successfully, but the plaintiff, being alarmed at the apparently unavoidable collision, jumped from the car and received injuries thereby, it was held to be for the jury whether she could recover damages from the railway company, and that her conduct did not necessarily bar her right of action.[2]

§ 736. **Sudden Peril.** — The reason of this rule is that the jumping from the car or other imprudent action in such cases, is the result of a sudden peril to which the passenger is exposed through the negligence of the company, and which leaves him no time for reflection, but a necessity for acting without thought, and the defendant company cannot avail itself of this imprudence on his part since it is the result of the perilous situation in which he is placed by its own negligence.[3] So where a person tried to get on a street car while it was stopping, and as the car was suddenly started while she was in the act of getting on, she imprudently held on to the handle of the car, and by so doing was dragged along for some distance and received the injuries complained of, when, if she had released her hold upon the handle, she might have saved herself from injury, the court held that, since she was placed in the perilous situation by the negligence of the company, it could not rely upon this alleged carelessness on her part to defeat the action.[4]

§ 737. **Contributory Negligence as Proximate Cause, Burden of Proof.** — The contributory negligence of the plaintiff which will defeat his right of action must be such proximate negli-

[1] Dallas Consolidated Traction Railway Co. *v.* Randolph, 27 S. W. Rep. 925.

[2] Shankenbery *v.* Metropolitan Street Railway Co., 46 Fed. Rep. 177.

[3] Ibid.

[4] Joliet Street Railway Co. *v.* Duggan, 45 Ill. App. 450.

gence as combines with the negligence of the defendant to produce the injury, and not some remote negligence which enters into the case.[1] Thus the negligence of a parent in permitting his six-years-old son to ride upon electric cars is too remote negligence of the parent, if negligence at all, to prevent him from recovering for the injuries of the son by the negligence of the company.[2] The question of whether the plaintiff, in cases involving negligence, has the burden of proving due care on his part, or whether the defendant must show contributory negligence, depends on the practice of the State in which the action is brought. In some States the plaintiff has the burden of showing due care.[3] In any case, the jury may take all the facts into consideration, and say whether they show negligence.[4]

§ 738. **Question of Negligence for Court, when.** — The question of care and negligence, both as regards the defendant and the plaintiff, is ordinarily a question of fact which it is peculiarly in the province of the jury to settle.[5] But sometimes the question of negligence or care is so plain upon undisputed or ascertained facts that the court can, as a matter of law, say that the party in question was or was not in the exercise of due care or negligence. If, as a matter

[1] Buck *v.* People's Street Railway, Electric Light & Power Co., 46 Mo. App. 555.

[2] Buck *v.* People's Street Railway, Electric Light & Power Co., Ibid. Cf. as to imputed negligence, *post*, §§ 763–765.

[3] Elliott *v.* Newport Street Railway Co., 28 Atl. Rep. 338; Cooper *v.* St. Paul City Railway Co., 54 Minn. 384.

[4] Schepers *v.* Union Depot Railway Co., 29 S. W. Rep. 712. Cf. *ante*, § 725, and *post*, § 762.

[5] Creamer *v.* West End Street Railway Co., 156 Mass. 322; Bigelow *v.* West End Street Railway Co., 161 Mass. 395; Hart *v.* West Side Street Railway Co., 86 Wisc. 489; Buck *v.* People's Street Railway, Electric Light & Power Co., 46 Mo. App. 562; Elliott *v.* Newport Street Railway Co., 28 Atl. Rep. 338; Schepers *v.* Union Depot Railway Co., 29 S. W. Rep. 712; Joliet Street Railway Co. *v.* Duggan, 45 Ill. App. 451; Cooper *v.* St. Paul City Railway Co., 54 Minn. 384; Walters *v.* Phila. Traction Co., 161 Pa. St. 36; Slaughter *v.* Metropolitan Street Railway Co., 116 Mo. 269.

of common knowledge and experience, the court can say that upon the undisputed or ascertained facts, the plaintiff or defendant was not in the exercise of adequate care, and that the injury was in part attributable to such want of adequate care, the court may take the case from the jury and direct a verdict either for the plaintiff or defendant, as the facts show; and similarly, if the whole evidence introduced by either plaintiff or defendant has no tendency to show care on the part of the person introducing it, but on the contrary shows negligence, the court may direct the jury to return a verdict for the other party.[1]

§ 739. **As to Travellers on Highways.** — The rules which govern the operation of electric cars upon highways, as concerning the travellers thereon, are somewhat different from those regarding the passengers in the car. As to the latter, it is already seen,[2] that the railway company is bound to use the highest degree of care, foresight, and vigilance to insure their safety. As to travellers on the highway, however, the railway company is only obliged to use reasonable care in the operation of the cars,[3] although the degree of care which is reasonable in the operation of an electric road is higher than the degree reasonable in operating a horse car line, because of the greater danger of serious accident in the case of the electric car.[4] Perhaps the better way of putting the rule is to say that in each case the railway company is bound to use reasonable care, but that the care which is reasonable varies in the various cases.[5] The question of

[1] Creamer *v.* West End Street Railway Co., 156 Mass. 322; Hart *v.* West Side Street Railway Co., 86 Wisc. 489; Elliott *v.* Newport Street Railway Co., 28 Atl. Rep. 338.

[2] *Supra*, § 720.

[3] Gibbons *v.* Wilkesbarre, etc. Street Railway Co., 155 Pa. St. 279; Gilmore *v.* Federal Street & Pleasant Valley Pass. Railway Co., 153 Pa. St. 31; Hickman *v.* Union Depot Railroad Co., 47 Mo. App. 65.

[4] Hickman *v.* Union Depot Railway Co., 47 Mo. App. 72.

[5] San Antonio Street Railway Co. *v.* Mechler, 29 S. W. Rep. 202; Gibbons *v.* Wilkesbarre, etc. Street Railway Co., 155 Pa. St. 282.

whether the plaintiff or defendant has been negligent is for the jury.[1]

§ 740. **No Exclusive Right to Street.** — The electric car is a comparatively new vehicle in the streets, and the courts have not yet entirely settled the rules which govern the operation of such vehicles, or the actions of travellers in using the streets jointly with the electric cars. One point, at least, has been definitely settled, that the electric railway has no exclusive right to the use of that portion of the street occupied by its tracks. It follows, therefore, that a traveller along the highway is not a trespasser merely because he is on the track of the electric railway, and, conversely, the electric railway in operating its cars along a street is obliged to take reasonable care to prevent injury to persons using the street either on foot or in teams.[2]

§ 741. **Paramount Right of Car.** — Although, as has been seen, the public have a right to use the whole of the street for travel, and the fact that a portion of it is occupied by the tracks of a street railway company does not deprive them of this right, and they can exercise it in common with the street railways, yet there is this exception, that as the street railway car cannot leave its track to turn out, it has a paramount right to use that portion of the streets covered by its tracks, but only in so far as that it is the duty of other teams or travellers to turn out in reasonable time to allow the electric cars to pass and avoid accident.[3] The motor-

[1] See cases *supra*, note 3, p. 612, and *ante*, § 738.

[2] Gibbons *v.* Wilkesbarre, etc. Street Railway Co., 155 Pa. St. 279; Gilmore *v.* Federal Street & Pleasant Valley Pass. Railway Co., 153 Pa. St. 31; Hickman *v.* Union Depot Railroad Co., 47 Mo. App. 65; San Antonio Street Railway Co. *v.* Mechler, 30 S. W. Rep. 899; Montgomery *v.* Lansing City Electric Railway Co., 61 N. W. Rep. 543; Central Pass. Railway Co. *v.* Chatterson, 29 S. W. Rep. 18; Houston City Street Railway Co. *v.* Woodlock, 29 S. W. Rep. 817.

[3] Quinn *v.* Railroad Co., 134 N. Y. 611; Glazebrook *v.* West End Street Railway Co., 160 Mass. 239; Hickman *v.* Union Depot Railway Co., 47 Mo. App. 72; Cincinnati Street Railway Co. *v.* Whitcomb, 66 Fed. Rep.

man of the car, however, if he sees that the traveller is not turning out, must on his part, do what he can in the way of stopping the car to avoid collision.[1]

§ 742. **Driving in Front of Car.** — When driving along a track in front of a car approaching from the rear, it may be negligence if the driver of the wagon does not look around at all to see whether any car is approaching, and if the motorman is ringing his gong reasonably often, the action of the driver of the wagon in not paying any attention to the gong, and not looking around to see if a car is approaching, is such contributory negligence as will deprive him of the right to recover for injury to his wagon caused by collision

915; Houston City Railway Co. *v.* Woodlock, 29 S. W. Rep. 817; Lake Roland Electric Railway Co. *v.* McKewen (Md.) 31 Atl. Rep. 797; Montgomery *v.* Lansing City Electric Railway Co., 61 N. W. Rep. 543; Moore *v.* Kansas City & I. R. Tr. Railway, 29 S. W. Rep. 9.

[1] Glazebrook *v.* West End Street Railway Co., 160 Mass. 239; Hickman *v.* Union Depot Railway Co., 47 Mo. App. 72; Montgomery *v.* Lansing City Electric Railway Co., 61 N. W. Rep. 543; Moore *v.* Kansas City & I. R. Tr. Railway, 29 S. W. Rep. 9; Central Pass. Railway Co. *v.* Chatterson, 29 S. W. Rep. 18. It is not, *per se*, negligence for a street procession to walk on an electric railway track in the street, even though a band is playing at the same time, rendering it impossible to hear the approach of a car from behind. If the motorman sees the procession walking ahead of him, and the band playing, it may be negligence for him not to slow down. Both questions of conduct are for the jury. Montgomery *v.* Lansing City Electric Railway Co., 61 N. W. Rep. 543. So if a person is paving the street along the track, and standing on the track, the motorman, if he sees such person is not attending to the approach of the car, must stop. Houston City Railway Co. *v.* Woodlock, 29 S. W. Rep. 817. In an action against an electric railway company for the collision of an electric car with the plaintiff's team, where the defence is that the plaintiff was negligent, because he was intoxicated, and the defendant introduces evidence that the conductor of the car saw the plaintiff driving his team before the collision, and that the plaintiff acted as if intoxicated, and that after the accident, when he picked up the plaintiff, he had smelled liquor, and knew that the plaintiff was intoxicated, evidence in rebuttal is not admissible as to the temperance habits of the plaintiff, and that the witness testifying to these habits had never known the plaintiff to drink or to be drunk. Carr *v.* West End Street Railway Co., 163 Mass. 360.

with the car.[1] On the other hand, if the driver of the wagon looks around from time to time reasonably often, and if the motorman of the car does not ring his gong at all, the driver of the wagon is free from contributory negligence, and the car company must respond to the damages caused by any collision.[2]

§ 743. **Watch by Motorman.** — One of the most important points in the operation of an electric car is that the motorman should keep a careful watch ahead to see what is before him, and thus guard against accidents. Any inattention on his part to the business of governing the motions of the car as required by the actions of teams and travellers is negligence of the company,[3] and if the car is backing there should be some one on the rear end to look out for travellers.[4]

§ 744. **Ringing Gong.** — The electric car, by reason of its swift motion and difficulty of control, is obliged to give timely warning of its approach.[5] This warning is usually given by means of a gong placed on the front of the car and rung from time to time by the motorman. Failure on his part to ring it reasonably often, or when necessary to give warning of the approach of the car, may be negligence, the question whether or not it is so being for the jury.[6] If a

[1] Winter *v.* Cross Town Street Railway Co., 8 Misc. Rep. (N. Y.) 362. But cf. Benjamin *v.* Holyoke Street Railway Co., 160 Mass. 3.

[2] Arnesen *v.* Brooklyn City Railroad Co., 9 Misc. Rep. (N. Y.) 270; Quinn *v.* Railroad Co., 134 N. Y. 611; Central Pass. Railway Co. *v.* Chatterson, 29 S. W. Rep. 18.

[3] Dowd *v.* Brooklyn Heights Railroad Co., 29 N. Y. Suppl. 745; Dallas Rapid Tr. Street Railway Co. *v.* Dunlap, 26 S. W. Rep. 877; Omaha Street Railway Co. *v.* Duvall, 58 N. W. Rep. 531; Ellis *v.* Lynn & Boston R. R. Co., 160 Mass. 341; Doyle *v.* West End Street Railway Co., 161 Mass. 533; Jones *v.* Brooklyn Heights Railway Co., 31 N. Y. S. 445.

[4] Cameron *v.* Union Trunk Line, 39 Pac. Rep. 128.

[5] Hickman *v.* Union Depot Railway Co., 47 Mo. App. 72.

[6] Dallas Rapid Transit Railway Co. *v.* Elliott, 26 S. W. Rep. 455; Arnesen *v.* Brooklyn City Railroad Co., 9 Misc. Rep. (N. Y.) 270; Quinn *v.* Railroad Co., 134 N. Y. 611; Rascher *v.* East Detroit & Grosse Pointe Ry. Co., 90 Mich. 413; Omaha Street Railway Co. *v.* Duvall, 58 N. W. Rep. 531.

person in a place of danger, hearing the gong, does not get into a place of safety, this may in absence of sufficient cause, be negligence on his part, if the jury so find.[1]

§ 745. **Ringing Gong Negligence, when.** — The ringing of the gong may, of itself, be negligence under some circumstances. The electric cars have a tendency to frighten horses, and in some cases, so much so as to render the horse unmanageable. In such a case it is negligence for the motorman to sound his gong loudly or suddenly, or in any way unreasonably. The question of whether the gong in any case was properly sounded or not, and whether the sounding of it at all under the circumstances was negligence, is for the jury.[2]

§ 746. **Stopping Car on meeting Frightened Horse.** — While the tendency of electric cars to frighten horses has not been considered sufficiently important to prevent the operation of electric cars in the streets, especially as horses soon become familiarized to them, yet it imposes a duty of care upon the motorman, and when he sees a horse in the street ahead of the car, which is evidently frightened and becoming unmanageable, and there is danger of an accident, the motorman must slow down the car, and stop if necessary.[3] The test of whether it is necessary to stop cannot be said to be definitely fixed, but is a matter for the jury upon the whole circumstances of the case, whether the motorman did or did not sufficiently slow down or stop the car as the circumstances demanded.[4] The distance at which the slowing must be

[1] Doyle *v.* West End Street Railway Co., 161 Mass. 533.

[2] Philadelphia Tract. Co. *v.* Lightcap, 61 Fed. Rep. 762; Benjamin *v.* Holyoke Street Railway Co., 160 Mass. 3; Ellis *v.* Lynn & Boston Railroad Co., 160 Mass. 341.

[3] Cornell *v.* Detroit Electric Ry. Co., 82 Mich. 495; Benjamin *v.* Holyoke St. Ry. Co., 160 Mass. 3; Ellis *v.* Lynn & Boston Railroad Co., 160 Mass. 341; Gibbons *v.* Wilkesbarre, etc. Street Railway Co., 155 Pa. St. 279; Citizens' Street Railway Co. *v.* Lowe, 39 N. E. Rep. 165; Greeley *v.* Federal St. & Pleasant Valley Pass. Ry. Co., 153 Pa. St. 218.

[4] Cases, *supra*, note 3.

begun is also a question for the jury. Ordinarily it should undoubtedly be as soon as the motorman sees or with reasonable care ought to see that the animal is dangerously frightened.[1] It has been held that where the motorman began to slow down at a distance of three hundred and fifty or four hundred feet from the horse, that being as soon as the motorman saw him, there was no negligence to be imputed to the railway company.[2] It is a question whether the horse appeared so frightened that it was reasonable for the motorman to slow down and stop. If there are no visible signs of excessive fright the car may run past at a speed not illegal.[3]

§ 747. **Testing Horse.** — On the other hand, the owner of a horse has no right to drive the animal up to an electric car or along a street where he knows electric cars will come, for the mere purpose of testing the horse, and seeing how he will behave, since the well-known tendency of the electric car to frighten horses at first sight renders this proceeding contributory negligence.[4]

§ 748. **Collision with Horseback Rider.** — The motormen of electric cars are obliged to use reasonable care and diligence in averting accidents to persons riding horses along the streets as well as to those driving in carriages, and the fact that the horseman is unskilful is not negligence on his part which will prevent him from recovering damages.[5] Thus where the plaintiff was riding along the street by the side of one of the double tracks of the defendant company, and his horse becoming frightened jumped upon the track, and as cars were coming on the other track so that it was not safe for him to go on that, the driver endeavored to compel him to go back on to the roadway, but the horse refused to go, and while this attempt was in progress a car approached on

[1] Cornell *v.* Detroit Electric Ry. Co., 82 Mich. 495.

[2] Ibid.

[3] Yingst *v.* Lebanon & A. Street Railway Co. (Pa.), 31 Atl. Rep. 687.

[4] Cornell *v.* Detroit Electric Ry. Co., 82 Mich. 499.

[5] Omaha Street Railway Co. *v.* Duvall, 58 N. W. Rep. 531.

the track upon which they were, and the motorman was not looking forward, but had his attention fixed upon a bicycle rider who was abreast of the car, and endeavoring to outstrip it, and owing to this inadvertence of the motorman a collision ensued, whereby the plaintiff was thrown from his horse and injured, it was held that he could recover damages. The court said that if the plaintiff's horse sprang upon the track so suddenly that there was no time for the motorman, by the use of reasonable efforts, to check the car, then there was no liability on the company. But if the motorman could have seen the horse in time to check the car, but did not so see him by reason of his attention being drawn to the bicycle, then the company was liable.[1]

§ 749. **Reversing Current.** — The failure of the motorman to reverse the current of his car in cases of emergency may, under certain circumstances, be evidence of negligence on his part.[2] Thus where the facts were that the car was on a down grade, and the rails were slippery on account of rain, and the brakes failed to hold, and in consequence the car collided with a wagon crossing the track, the court held that it was for the jury to say whether, under the circumstances, the motorman should have reversed the current when he saw the danger of an accident, and found that his brakes would not hold, this being evident about three hundred feet from the crossing.[3] There is, however, a difference of opinion among experts as to the necessity or even advisability of reversing the current in sudden and critical dangers.

§ 750. **Speed exceeding City Ordinance.** — In many cases the municipal authorities have passed ordinances prohibiting electric street cars from running beyond a limited rate of speed, as, for instance, eight miles an hour. The purpose of these ordinances is to prevent danger to travellers, both

[1] Omaha Street Railway Co. *v.* Duvall, 58 N. W. Rep. 531.
[2] Patterson *v.* Townsend, 59 N. W. Rep. 205.
[3] Ibid.

walking and riding, and if a collision or accident occurs while the car is running at a rate of speed exceeding the limit of the ordinance, this fact, in absence of explanation, is evidence of negligence, from which a liability of the company may be found by the jury;[1] and excessive or unusual speed may also be found to be negligence by the jury even where no ordinance prescribes the exact rate.[2]

§ 751. **Slipping Trolley Pole.** — If the conductor of an electric car, whose duty it is to see that the trolley pole is kept in contact with the trolley, knows that at a certain place the trolley is apt to slip off from the trolley wire, and that there is danger of its then hitting and breaking a telephone wire which crosses the street at that place, and nevertheless he negligently allows the trolley pole so to slip off and break the telephone wire, which then falls across the bare trolley wire, and one end falling on the ground hits a horse, and, discharging into him the electric railway current, kills him, this is evidence of negligence upon which the jury may find a verdict of guilty against the railway company.[3]

§ 752. **Action for killing Dog.** — The facts were that the snow was deep on the street, and the track of the railway company had been ploughed out, leaving an elevation of six or eight inches on each side. The dog ran ahead of the car for a long distance to reach a cross-path so as to get off the track. The motorman rang the gong, but did not slow up the car, and ran over the dog. The court held this was evidence of negligence on the part of the motorman.[4]

§ 753. **Headlight.** — As a street car cannot leave its tracks nor turn aside, and moves with greater rapidity and

[1] Omaha Street Railway Co. *v.* Duvall, 58 N. W. Rep. 531; Riley *v.* Salt Lake Rap. Tr. Co., 37 Pac. Rep. 681; San Antonio Street Railway Co. *v.* Mechler, 29 S. W. Rep. 202.

[2] Houston City Street Railway Co. *v.* Woodlock, 29 S. W. Rep. 817.

[3] Kankakee Electric Railway Co. *v.* Whittemore, 45 Ill. App. 484.

[4] Meisch *v.* Rochester Electric Railway Co., 25 N. Y. Suppl. 244.

momentum than vehicles drawn by horses, and the danger of collision and accident to travellers is greater, the car therefore ought to be lighted in the night-time, in such a manner that its approach can be seen by other travellers, or if not lighted, it ought to be run so slowly as to avoid collision, or else give, by some signal, warning of its approach. The ordinary method of giving warning is by gong, and in the dark by a headlight affixed to the front of the car, although other sufficient forms of lighting might be enough. It is, however, evidence of negligence for an electric car to run at its usual speed along a street in the dark without any light unless the gong is kept ringing with such frequency as to give sufficient notice of the approach of the car.[1]

When a city ordinance provides that electric cars must have colored signal lights on the front and rear, a failure to have a headlight is not *per se* negligence, but a failure to have either signal lights or headlight or any light in the evening when the car is moving rapidly without any signal of approach, is evidence of negligence which will justify a verdict.[2]

§ 754. **Repairing Tracks, Warning to Travellers.** — While the street railway company is in process of repairing its tracks, it is evidence of negligence on its part if it does not have them barricaded in the daytime, and sufficiently lighted at night, to keep travellers from using that portion of the way, and the railway company will be liable even though the repairs on the tracks were made necessary by raising the grade of the street or other repairs on the street, if, in fact, the repairs on the track itself were done by the officials of the railway company, and under their direction and control.[3]

[1] Rascher *v.* East Detroit & Grosse Pointe Ry. Co., 90 Mich. 413; Omaha Street Railway Co. *v.* Duvall, 58 N. W. Rep. 531.

[2] Rascher *v.* East Detroit & Grosse Pointe Ry. Co., 90 Mich. 413 Cf. McGee *v.* Consolidated Street Ry. Co., 60 N. W. Rep. 293.

[3] Wagner *v.* Pittsburg & W. E. Passenger Ry., 158 Pa. St. 419.

§ 755. **Crossing Tracks.** — There have been many cases in which accidents have occurred when travellers attempted to cross the tracks of an electric railway, either on foot or in teams, in front of an approaching car. While, as was said before,[1] the question is for the jury as to which party, if either, was negligent, there has been in several States a tendency to lay down a rule that a person who is about to cross an electric railway track must look and listen before doing so, and if not, he will be deemed guilty of negligence contributory to the accident.[2]

§ 756. **Same Subject** (*continued*). — This point was discussed in a case in Pennsylvania.[3] The facts in this case were that the plaintiff's team, in charge of a driver, crossed the defendant's tracks at right angles. When the driver reached the intersection he listened, but neither stopped nor looked for a car, but drove directly upon the defendant's track. When in this position he looked up, and saw the car just upon him. There was no time to escape. His wagon was crushed, and he was injured, and an action was brought by his employer to recover damages. The question on which the case turned in the trial court was whether the evidence of the plaintiff established contributory negligence in the driver. Upon this subject the learned judge instructed the jury that there was no rule of law which required the driver "to stop, look, and listen," but that it was for them to determine what it was his duty to do, and whether he actually did it on this occasion. The Supreme Court, on appeal, held that this was wrong; that the jury were thus left without any rule of law to apply, at liberty to make one

[1] *Supra*, § 739.

[2] Hickman *v.* Union Depot Railway Co., 47 Mo. App. 65; Carson *v.* Federal Street & Pleasant Valley Pass Railway Co., 147 Pa. St. 219; Gilmore *v.* Same, 153 Pa. St. 31; McGee *v.* Consolidated Street Railway Co., 60 N. W. Rep. 293; Hickey *v.* St. Paul City Railway Co., 61 N. W. Rep. 893; Boerth *v.* West Side Railroad Co., 87 Wisc. 288.

[3] Carson *v.* Federal St. & Pleasant Valley Pass. Railway Co., 147 Pa. St. 219.

to suit themselves for the purposes of this case, which the next jury might change to suit themselves, or disregard altogether.

§ 757. **Same Subject** (*continued*). — The Supreme Court says: "The street railway has become a business necessity in all great cities. Greater and better facilities and a higher rate of speed are being constantly demanded. The movement of cars by cable or electricity along crowded streets is attended with danger, and renders a higher measure of care necessary, both on the part of the street railways, and those using the streets in the ordinary manner. It is the duty of railway companies to be watchful and attentive, to use all reasonable precaution to give notice of their approach to crossings and places of danger. Their failure to exercise the care which the rate of speed and the condition of the street demand is negligence. On the other hand, new appliances, rendered necessary by the advance in business and population in a given city, impose new duties on the people.

"The street railway company has a right to the use of its track, subject to the right of crossing by the public at street intersections; and one approaching such a place of crossing must take notice of it, and exercise a reasonable measure of care to avoid contact with a moving car. It may not be necessary to stop on approaching such a crossing, for the rate of speed of the most rapid of these surface cars is ordinarily from six to nine miles per hour; but it is necessary to look before driving upon the track. If by looking the plaintiff could have seen and so avoided an approaching train, and this appears from his own evidence, he may be properly nonsuited."

§ 758. **Opposite Decisions.** — It has in other States, however, been decided that it is not invariably true that failure to stop, look, and listen, or even to look and listen before crossing the track, is contributory negligence on the part of

the plaintiff, but that such failure should go to the jury simply as one of the circumstances of the case.[1] In some cases such failure is plainly excusable, as if a person starts to cross the street at a time when everything is reasonably clear for this purpose, and before reaching the electric car track is embarrassed by teams driving along the street, stopping and starting irregularly, so that the attention of the traveller is turned in the opposite direction from the side from which the car is coming, and the car does not ring its gong. Under such circumstances it has been held that the case may go to the jury on the question of the prudent conduct of the plaintiff, the rule being simply that the conduct of the plaintiff must be that of a reasonably prudent man under the circumstances, and this is a question for the jury.[2]

§ 759. **Crossing in Front of Car.** — It may be found by the jury not to be negligence for a person to cross the tracks of a street railway company even in face of the approach of an electric car, if the circumstances show that that is a reasonable course of conduct.[3] Thus, where the plaintiff was driving a pair of spirited horses hitched to a long and heavy market wagon, and, approaching the crossing of an electric car track, stopped and looked and listened, but owing to the buildings could not see the approach of the electric car, and started his team, and when he got near the track with his horses going at a fair gait, saw the approach of the car, and whipped up his horses to get across, the court held that it could not, as a matter of law, say that this conduct was contributory negligence.[4] So where a person, seeing a car three hundred feet away, drove on across the track, but the

[1] Cincinnati Street Railway Co. *v.* Whitcomb, 66 Fed. Rep. 915; Creamer *v.* West End Street Railway Co., 156 Mass. 320.

[2] Connelly *v.* Trenton Passenger Railway Co., 29 Atl. Rep. 438; Newark Passenger Railway Co. *v.* Block, 27 Atl. Rep. 1067.

[3] Patterson *v.* Townsend, 59 N. W. Rep. 205; Downey *v.* Pittsburg, Alleghany & M. Tr. Co., 161 Pa. St. 131.

[4] Downey *v.* Pittsburg, Alleghany & M. Tr. Co., *supra.*

car was on a down grade and going at an unusual rate of speed, the court held that this did not disclose such facts as constituted in law contributory negligence, but that the question was for the jury.[1] It is the duty of a motorman, however, on approaching a crossing, to keep his car well in control,[2] and to ring his gong, but not necessarily to stop before crossing.[3]

§ 760. **Crossing in Front of Car** (*continued*). — So where a foot traveller along the highway crossed the street at the usual street crossing at a point where there was a double track line of the defendant company, and as she approached the crossing a car going west bound approached on one track, ringing its gong violently, and attracting the attention of persons crossing, and another car approached east bound not ringing its gong or making any signal to attract attention, and running at a rapid rate, and the traveller crossed the west-bound track in safety, but was injured by the east-bound car, which she had not noticed, it was held that the jury might decide whether or not she was in the exercise of due care.[4]

It is, however, contributory negligence for a person intending to cross a street and seeing a car approaching with vehicles on each side of it, to attempt to calculate that he can dodge in front of one of the vehicles and the car, and behind the other vehicle, or make similar nice calculations, and if he is injured in attempting to do so, he cannot recover his damages.[5]

§ 761. **Same Subject** (*continued*). — When a person driving along a street, and intending to cross a railway track, sees a car standing on a switch up the street, evidently waiting

[1] Patterson *v.* Townsend, 59 N. W. Rep. 205. See also, Mackie *v.* Brooklyn City Railroad Co., 30 N. Y. Suppl. 539.

[2] Savannah T. & I. of H. Railway *v.* Bryan, 21 S. E. Rep. 57.

[3] Savannah T. & I. of H. Railway *v.* Beasley, 21 S. E. Rep. 285.

[4] Dallas Rapid Transit Railway Co. *v.* Elliott, 26 S. W. Rep. 455.

[5] Trowbridge *v.* Danville Street Car Co., 19 S. E. Rep. 780.

for another car to pass it, it is negligence for him not to look in the other direction to see whether the other car is approaching, and if he is damaged by collision it is his own contributory negligence.[1] When a person approaching the crossing of an electric street railway track sees below the crossing a car standing still, and neither conductor nor motorman upon it, and drives across the track, and while he is on the track the conductor and motorman jump on the car and start it up and run into him, there is no evidence of negligence on his part, but there is negligence on the part of the railway company sufficient to justify a verdict in plaintiff's favor.[2] When a person about to cross an electric railway track in a wagon sees a car coming, and stops, but is motioned by the signal man stationed at that position by the electric railway company to cross, and does so, and is struck by the car, this is sufficient evidence of due care on the part of the plaintiff to allow a jury to return a verdict in his favor.[3]

§ 762. **Contributory Negligence.** — If it plainly appears on the plaintiff's own evidence that he is guilty of negligence, and this negligence is responsible in any degree for his injuries, the case must be taken from the jury. But if his negligence appears only in the evidence of the defendant, the jury must decide the case, for they may not believe the defendant's witnesses.[4]

§ 763. **Contributory Negligence of Children.** — In cases where accidents happen to young children, the question of contributory negligence divides itself into two branches. First, whether the child is *sui juris*, and if so, whether or not he was guilty of contributory negligence; and second, whether, if the child is not *sui juris*, the parents are guilty

[1] Davidson *v.* Denver Tramway Co , 35 Pac. Rep. 921.

[2] Piper *v.* Pueblo City Railway Co., 36 Pac. Rep. 158.

[3] Haney *v.* Pittsburg, Alleghany & M. Tr. Co., 159 Pa. St. 395.

[4] Downey *v.* Pittsburg, Alleghany & M. Tr. Co., 161 Pa. St. 131; Gilmore *v.* Federal Street & Pleasant Valley Pass. Railway Co., 153 Pa. St. 31.

of contributory negligence, in which latter case, if the action is by the child, this is called the imputed negligence of his parents, whereas if the action is by the parents, it is contributory negligence.

§ 764. **Negligence is for Jury, generally.** — In cases where the child is extremely young, the court may be able to say as a matter of law that it is plainly *non sui juris*, but generally the question of whether or not the child is of such development and discretion as to make him capable of managing his own conduct, is for the jury.[1] Even when a child is *sui juris*, it is not held to so great a degree of diligence as a person of mature years.[2]

§ 765. **Imputed Negligence of Parents.** — If the child is not of sufficient age to be responsible for the management of its own conduct, then the question is whether the parents were guilty of negligence which contributed to the accident.[3] It is imputed negligence for parents to allow children who are not old enough to be responsible for their own actions to wander upon the streets,[4] and if accidents happen as the result, the negligence of the parents will prevent them from recovering for the injuries to the child, but in every case it is a question of fact for the jury, whether the parents did, in fact, carelessly allow the child to wander upon the streets.[5] So in a case where the facts were that the child

[1] Keenan *v.* Brooklyn City Railroad Co., 8 Misc. Rep. (N. Y.) 601; Dowd *v.* Brooklyn Heights Railroad Co., 9 Misc. Rep. (N. Y.) 279; Young *v.* Atlantic Avenue Railway Co., 31 N. Y. Suppl. 441; Buck *v.* People's Street Railway El. L. & P. Co., 46 Mo. App. 562; Mason *v.* Minneapolis Street Railway Co., 54 Minn. 216. Cf. Austin Rap. Tr. Railway Co. *v.* Cullen, 30 S. W. Rep. 578.

[2] Young *v.* Atlantic Avenue Railway Co., *supra*.

[3] Keenan *v.* Brooklyn City Railway Co., 8 Misc. Rep. (N. Y.) 601; Dowd *v.* Brooklyn Heights Railroad Co., 9 Misc. Rep. (N. Y.) 279; Powers *v.* Quincy & Boston St. Railway Co., 163 Mass. 5.

[4] *Contra*, Riley *v.* Salt Lake Rap. Tr. Co., 37 Pac. Rep. 681.

[5] Dunseath *v.* Pittsburg, Alleghany & M. Tr. Co., 161 Pa. St. 128; Buck *v.* People's Street Railway El. L. & P. Co., 46 Mo. App. 563.

injured had been in the house with its mother and young sister, and had followed the sister out into the yard when the latter went out on her way to school, and the yard was enclosed by a fence in which a gate opened on to the street, the gate being fastened with a catch and sometimes with a rope, and the children had been instructed by their parents to fasten the gate whenever they passed in or out, and the sister, going out, left the gate open, and the child followed the sister out into the street, where the accident occurred, the court held that on these facts it could not, as a matter of law, say that the mother, plaintiff in a suit for the death of the child, was guilty of contributory negligence.[1]

§ 766. **Pennsylvania Cases.** — The Supreme Court of the State of Pennsylvania has, in two recent cases which arose on somewhat peculiar facts, given indications of the degree of care required of electric street railways in operating their cars along the public streets. In both cases the plaintiff or his servant had left his horse and wagon standing upon the tracks of the electric car. Both accidents took place on dark evenings, and in both cases the electric car ran into the horse and wagon and injured them.

In one case,[2] the evidence showed that the plaintiff drove on a dark evening into a dark and unlighted alley, and left his horse standing on the tracks of the defendant company in charge of another person while he went into a store. When the car came along at high speed, the person in charge of the horse first tried to drive him off, and then got down and pulled at his head, but did not get the horse off the track in sufficient season, and the car running into the horse and wagon damaged both. The court held that there was negligence on both sides, and the plaintiff could not recover.

[1] Powers *v.* Quincy & Boston Railway Co., 163 Mass. 5.

[2] Gilmore *v.* Federal Street & Pleasant Valley Passenger Railway Co., 153 Pa. St. 31.

In another case,[1] the facts showed that the plaintiff was employed by a party to move his furniture from one house to another; that he spent all the day in moving the furniture; and, after getting it almost all moved, he took a safe on his dray, and drove up with it to the door of his employer's new house. He attempted to turn his horse and wagon around so as to back up against the sidewalk, and thus take the safe off his team. He attempted to do this twice, and each time was stopped by electric cars coming along the track in front of the horse over which the team would have to stand while the safe was being unloaded. The third time he drove his team, and placed it squarely across the tracks, remarking that he guessed that would be plain enough for the car people to see. He afterwards requested his employer to stand up the street and warn the cars as they came down the street, which the employer promised to do, but did not. A car came down at full speed and ran into the team, injuring the horse and wagon. The court held that there was negligence on the part of the plaintiff.

§ 767. **Operation of Railway, as to Employees.** — The general rules governing the operation of an electric railway, so far as concerns the employees, are the same as those governing the relations of master and servant, which have been discussed in relation to the operation of telegraph and electric light lines,[2] the principal difference between such rules and those governing the liability of electric railways as to travellers in the highways being that an employee is supposed to accept the obvious risks of the employment, and therefore cannot recover for accidents caused thereby, even though the accident is caused by the negligence of co-employees of the company. Few cases have been decided as

[1] Winter *v.* Federal Street & Pleasant Valley Passenger Railway Co., 153 Pa. St. 26.

[2] *Supra*, §§ 266–272.

yet on points which involve the application of electricity to the operation of street cars, but some of the more important cases are given in the following sections.

§ 768. **Injury while cleaning Electrical Apparatus.** — A motorman sued for injury to his arm while cleaning the commutator of a car. The facts of the case were that the commutator was below the flooring of the car, and so near an axle which was directly over it that in cleaning it the motorman was obliged, after removing the trap-door in the floor of the car, to put his arm near the revolving axle and gearing. While so doing his coat sleeve was caught, and his arm drawn into the gearing and mangled. The plaintiff was twenty-four years old, and had been instructed for eight days in the duties of a motorman before assuming that position, and had been employed three days before the accident happened, and had also seen another motorman clean the commutator twice. The court held that this was an obvious risk of the employment; that the gearing was machinery with which any one of ordinary intelligence might be supposed to be familiar; and that the instruction given before he became a motorman was sufficient to explain the dangers of the employment.[1]

§ 769. **Bucking Electric Car.** — Electric cars sometimes, owing to defective machinery, stop suddenly, and then start instantaneously again. This trick is called by the motormen "bucking," and may produce serious results. For instance, in a case in Minneapolis, a car so bucking threw the motorman over the dashboard, and then starting again immediately ran over him and killed him. The court held that the defendant company was liable, because it had notice of this habit of the car and had failed to remedy it, and therefore had not supplied the motorman with proper machinery. The facts in the case were these. The car bucked several times in June, and this fact was reported at

[1] Burnell *v.* West Side Railroad Co., 87 Wisc. 387.

the defendant's office. Thereupon new field coils were put into the front motor, but the rear motor was not repaired. The car was put into service again, and was run until October first, when it was carefully examined and a new armature was put in. It then ran all right for two weeks, and then bucked again, but on examination no fault was apparent, and it was run right along. On the day before the accident happened, the motorman reported at the office that the motor was flashing on both sides. Thereupon new brushes and brush-holders were put in that night, and the car ran all the forenoon all right, but at half-past one in the afternoon it bucked again, with fatal results to the motorman. The day was bright and clear, and there was no moisture to affect the insulation. The dashboard was two feet ten and one-half inches in height, and the motorman was six feet. He had been employed for a year and a half, and understood his business thoroughly. The theory of the plaintiff was that the field coils in the rear motor were defective, and that when those in the front motor were replaced, the same should have been done for the rear motor, and the court held that the habit of the car of bucking was known to the defendant company, and that it was negligence in those who had the examination and care of the car not to remedy this defect, and therefore they were liable to the plaintiff, the administrator of the deceased motorman.[1]

§ 770. **Dashboard.** — The height of the dashboard of a car may sometimes be important in cases of accident, and evidence may be given in such cases of its being unusually low or otherwise insufficient. The fact that a dashboard is lower than usual is not of itself an obvious risk of employment which prevents an employee from recovering damages for an injury to which the lowness of the dashboard contributed together with unseen and unexpected causes.[2]

[1] Beardsley *v.* Minneapolis Street Railway Co., 54 Minn. 504.
[2] Ibid.

§ 771. **Passenger as Co-employee.** — The fact that a boy is allowed to ride on a street car without paying his fare because he turns the switches for the conductors and motormen has been said to render him a co-employee of the motorman so as to prevent him from recovering against the company for the negligence of the latter. This is qualified by saying that if the boy is allowed to ride simply in order that he may be induced to turn the switches when they are arrived at, he is not a co-employee of the company until he does turn a switch or agrees so to do in consideration of the free ride, and therefore if, while he is so riding, the conductor of the car expels him violently from the front platform while the car is going at a high rate of speed, he is not estopped from recovering damages against the company.[1]

§ 772. **Screen for Motorman.** — In two States statutes have been passed,[2] whereby it is made the duty of electric railway companies to provide, during the winter months, a screen constructed of glass or other material, to protect the motorman when stationed on the front platform of the car and guiding and directing the car. These acts also provide a fine upon the company and its agents for breach of the duty imposed upon them by this act. In Ohio this act applies to electric street cars only. In Minnesota it applies to electric, cable, or other cars propelled either by steam, cable, or electricity.

§ 773. **Constitutionality of this Statute.** — The Minnesota statute has been tested before the courts in two cases. The objections to the statute were that it was not a valid exercise of the police power of the State; and second, that it was class legislation. The court held that the driving of an electric car by the motorman standing in the front of the car, and unprotected from the extreme cold and the high

[1] Hart *v.* West Side Railway Co., 86 Wisc. 489.

[2] Ohio, Laws 1893, p. 220, §§ 1, 2. Minn., Gen. Laws 1893, ch. 63, §§ 1, 2, 3.

winds of that locality, was dangerous to his health, and that the State in the exercise of its police powers had an undoubted right to regulate the use of dangerous machinery; and second, that while the statute in question selected certain kinds of vehicles for its operation, namely, cable, electric, and steam cars, and omitted cars drawn by horses or other animals, yet this was not class legislation, because the statute, being intended to remedy an evil, might select those classes of conveyances in which the evil was remediable, and omit other cars drawn by animals, in which the evil was not remediable.[1] The Ohio act was also tested in a recent case, and the court held it constitutional, although it does not include horse or cable cars, for it operates uniformly throughout the State on all objects to which it applies; and moreover, the court cannot judicially know that horse or cable cars require it so much as electric cars.[2]

[1] State *v.* Hoskins, 59 N. W. 545; State *v.* Smith, Ib.

[2] State *v.* Nelson (Ohio), 39 N. E. Rep. 22. Cf. State *v.* Nelson, 31 Weekly L. Bull. 220.

CHAPTER XXXIII.

TAXATION.

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§ 774. **General View.** — Certain peculiarities in regard to the taxation of some of the electric companies require to be noticed. There have been various attempts to arrive at special forms of taxation in the case of telephone and telegraph companies on different principles from those which govern the taxation of other corporations and individuals. The principal varieties of this special taxation may be briefly summed up as follows: first, a tax based upon the gross receipts of the company from messages; second, a tax based upon the mileage of the company; third, a special privilege or license or franchise tax of an arbitrary amount. One or other of these forms has been tried in various States, either in connection with or in lieu of the ordinary tax on property, and there has been considerable alteration and amendment of the statutes relating to this subject, according as it was deemed best on the part of the legislators to adopt one or the other of the special forms of tax above adverted to. An outline of the State statutes will be given in the following sections, and then a discussion of the decisions which have been given by the courts in reference to these subjects.

§ 775. **Telegraph, Alabama.** — In this State, by the Code of 1886, telegraph companies were required to make a return to the State auditor of the number of miles of wire within the State, and the number of poles, batteries, instruments, and articles of all kinds connected with this business, and the value thereof, and also the gross receipts of the company during the preceding year.[1] The property thus returned was

[1] Code 1886, § 504.

assessed in the same way as the property of railroad companies. The other property of the telegraph company was assessed like the property of individuals.[1] In addition, a tax on the gross receipts from business done in the State was levied at the rate of $2.00 on the hundred.[2]

§ 776. **Gross Receipt Tax unconstitutional.** — This statute, in so far as it imposed a tax on the gross receipts of the telegraph company, has been construed by the Supreme Court of the United States.[3] The local assessors, in making assessment on the Western Union Telegraph Company, included not only receipts from messages sent wholly within the State, but also a *pro rata* portion of the receipts on interstate messages, representing the transportation of such messages into, through, and out of the State of Alabama. The Western Union Telegraph Company refused to pay this tax, but the Supreme Court of the State of Alabama held it to be constitutional so far as the constitution of the State of Alabama was concerned, and not to be an unlawful interference with interstate commerce.[4] This decision, however, was reversed by the Supreme Court of the United States on appeal,[5] the court holding that to allow a tax to be laid on any portion of the receipts of the company for messages sent out of, into, or through the State would be, in effect, to allow a tax to be imposed by the State upon interstate commerce, and therefore illegal. The discussion of this point in connection with other similar cases is given in succeeding sections of this chapter.[6]

§ 777. **Amendment of 1889.** — Presumably in consequence of the above decision of the United States Supreme Court,

[1] Code 1886, § 509. [2] Ib. § 454, cl. 6.

[3] Western Union Telegraph Co. *v.* Alabama State Board of Assessment, 132 U. S. 472.

[4] Western Union Telegraph Co. *v.* Alabama State Board of Assessment, 80 Ala. 273.

[5] 132 U. S. 472.

[6] See *post*, §§ 819–824; also *ante*, § 53.

section 454 of the Alabama Code was amended so as to impose, instead of a tax on the gross receipts, a privilege tax of $500, together with $1.00 for each mile of line, this tax to be in lieu of all others except licenses in municipalities, and taxes upon real estate, fixtures, and other property, which are to be taxed at the same rate as other property in the State.[1] This statute has not yet been construed by the courts, but is probably valid.[2]

§ 778. **Arkansas.** — In Arkansas each agent of a telegraph company doing business in the State is obliged to deliver a return to the assesssor showing the entire receipts of the year, including the proportion of gross receipts for business done by the company in connection with other lines of companies outside of the State, and this return is made the basis of taxation, except that office furniture and other real and personal property are assessed like other real and personal property.[3]

§ 779. **California.** — In California telegraph lines are assessed as real estate by the assessor of the county at a rate per mile for that portion of the lines which lie within his county, and the lines with their franchises and all improvements attached are listed as real estate, without separating the land and franchises and improvements, either in the description or valuation.[4] By a recent decision in California, it has been held that an assessment of the franchise of a telegraph company, without description of what franchise is assessed, is in reality assessing the franchise granted to the company by the Act of Congress,[5] and is therefore illegal and void.[6]

[1] Acts 1889, No. 103. [2] See *post*, § 837.

[3] Dig. §§ 5640, 5641. As to validity of such tax, see *post*, §§ 819–824.

[4] Cal. Pol. Code, § 3663. As to validity, see *post*, § 837.

[5] U. S. R. S., § 5263.

[6] San Francisco *v.* Western Union Telegraph Co., 96 Cal. 140; see also *post*, §§ 837, 838, and *ante*, § 54.

§ 780. **Colorado.** — In this State the company is obliged to make a return to the State Board of Equalization showing the whole number of miles of the lines of telegraph in the State of Colorado, and the full value of all the property of the company in the State and in each county through which the line extends;[1] and this property is assessed on the number of miles of telegraph wire in each county and the assessed value per mile.[2]

§ 781. **Connecticut.** — In this State the company was formerly obliged to deliver a sworn statement of the gross receipts at each of its offices, and to pay two per cent on the gross receipts paid to it in that State during the year, which was in lieu of all other taxes upon its estate used exclusively in telegraphy, but it might pay $10,000 in lieu of all taxes.[3] This method of taxation, however, which obtained until somewhat recently, has been changed, presumably on account of the decision in the Supreme Court of the United States,[4] by statute, whereby the telegraph company is obliged to make a return of the number of miles of wire owned, leased, or operated for telegraphic purposes, including the length of all wires strung or used in cables or other combinations, and to pay a tax of twenty-five cents per mile of such wire, which is in lieu of all other taxes upon personal estate used exclusively in the telegraphic business, but real estate is liable to taxation in the town where the same is situated.[5]

§ 782. **Delaware.** — In this State a tax is imposed upon the company according to the length of mileage of its lines, being sixty cents per mile for the longest wire in the State, thirty cents per mile for the next longest, and twenty cents per mile for every other wire owned, operated, and main-

[1] Ann. Stat. § 3801.
[2] Stats. 1891, p. 291. As to validity, see *post*, § 837.
[3] Gen. Stats. § 3929.
[4] *Post*, § 821.
[5] Stats. 1889, ch. 178, §§ 1, 2.

tained within the State. The facts necessary for this tax must be returned to the State treasurer by the company.[1]

§ 783. **Florida, Georgia.** — In Florida telegraph lines, properties, rights, and franchises are assessed in the same manner as railroads.[2] In Georgia a tax of two and one half per cent on the gross receipts is imposed upon telegraph companies, and the officers of the company are obliged to make such returns as will show the facts necessary for imposing this tax. The gross receipts for the purpose of this statute mean the full amount of all money received from business done in that State.[3]

§ 784. **Illinois.** — In Illinois telegraph companies are obliged to make a return showing the amount of capital stock and number of shares; the amount of stock paid in; the market value, or if there is no market value, the actual value of the shares; the total amount of debt, excepting current expenses; the length of the line in each county, and total in the State; and the total assessed valuation of all its tangible property. On the information contained in this return the Board of Equalization assess the value of the capital stock, and the tax is based on this valuation; but office furniture and other personal property of telegraph companies are listed and assessed in the place where they are used. The aggregate of the capital stock tax, as assessed, is distributed proportionately among the several counties.[4]

§ 785. **Indiana.** — In Indiana the method of taxation of telegraph companies has undergone a complete change. Formerly telegraph companies were taxed upon the gross receipts of the company, and also upon their tangible property.[5] By a later statute, this law was amended so as to cover only receipts from business beginning and terminat-

[1] Rev. Code, ch. 7; vol. 18, ch. 460. As to validity, see *post*, § 837.
[2] Rev. Stats. § 378; Acts 1893, No. 1, § 48, p. 28.
[3] Laws 1892, p. 29, § 9. As to validity, see *post*, §§ 819–824.
[4] Ann. Stat. ch. 120, par. 53–55, 111. As to validity, see *post*, § 839.
[5] Rev. Stats. § 6353.

ing within the State.[1] By a still later statute, the old method of assessing taxes upon telegraph companies seems to have been restored temporarily, namely, a tax on gross receipts without limitation as to where the same accrue, combined with a tax on tangible property within the State.[2] By the statute of 1893 [3] a new system of taxation was enacted to be carried out, as follows: The company makes a return showing the total capital, number of shares, and the par value of each share; the principal place of business; the market value of the shares, and if no market value, the actual value; the real estate, machinery, and fixtures subject to local taxation, and their location and value; the real estate outside of Indiana, and not directly used in the business; any mortgages upon the property; the total length of the lines, and the total length outside of the State, and the length in each of the counties and townships of the State. From the facts set forth in this return the State Board of Tax Assessors value the property of the company, taking the aggregate market value of the shares, or if there is no market value, the actual value, and adding any mortgages which may be upon the property. The board then deduct the value of the real estate not used in the business, and then arrive at the value of the property of the company within the State of Indiana by taking that proportion of the whole aggregate value which the length of the lines within the State of Indiana bears to the total length of the lines. This value of the property in Indiana is then to be still further reduced by the deduction of real estate, machinery, and appliances taxed locally, and the residue forms the value upon which the tax is assessed. The board of commissioners then find the value per mile of the property within the State by dividing the total value by the number of miles of line within the State, and then assess to the company in

[1] Stats. 1889, ch. 215, § 1.
[2] Stats. 1891, ch. 99, § 69.
[3] Ch. 171.

each county so much of the valuation as is produced by multiplying the value per mile by the number of miles in the county.[1]

§ 786. **Iowa.** — In this State telegraph lines are assessed in the following manner: The company makes a return showing the total number of miles owned, operated, or leased within the State, and a separate showing of the number leased; also the total number of miles in each separate line or division, with the number of wires thereon, and the counties through which the same is carried; also the total number of stations on each line, and instruments in use; also the average number of poles per mile used in the construction; and upon this statement the State Board of Equalization assess the true cash value of the lines, and determine the rate of tax to be levied and collected upon the assessment, which shall not exceed the average rate of taxes general, municipal, and local, levied throughout the State during the previous year, and this tax is in lieu of all other taxes, State and local.[2]

§ 787. **Kentucky.** — In Kentucky telegraph companies are obliged to pay a franchise tax based upon the value of the capital stock as affected by receipts, debts, etc., less the tangible property.[3] And by another statute the company is obliged to report each line and the number of wires used on it in each road district, and to pay to the sheriff of each county a road tax equal to fifteen cents per mile for each line of poles and first wire, and seven and one half cents per mile for each additional wire in each road district.[4]

§ 788. **Maine, Maryland.** — In Maine every telegraph company is obliged to pay into the State treasury a tax of two and one half per cent on the value of any telegraph line

[1] As to validity, see *post*, § 839.

[2] Ann. Code, §§ 1287, 2109–2116. As to validity, see *post*, § 837.

[3] Stats. §§ 4077–4091.

[4] Acts 1889, ch. 717, § 10. As to validity, see *post*, §§ 836, 837.

owned by the company within the State, including poles, wires, insulators, office furniture, batteries, and instruments, taking into consideration any circumstances or conditions affecting the value of the property; and this tax is in lieu of all State or municipal taxation on the property or shares of the company.[1] In Maryland telegraph companies are divided into two classes, one of which consists of foreign companies doing business in the State. These companies are obliged to pay to the State treasurer, in addition to real estate taxes, one per cent on the total gross receipts from business done in that State.[2] Domestic telegraph companies are obliged to pay a tax of one per cent on gross receipts.[3]

§ 789. **Massachusetts.** — In this State telegraph companies are taxed in the following manner: The tax commissioner ascertains from the returns of the company, or otherwise, the true market value of the shares of the company, and estimates therefrom the fair cash value of all the capital stock, and deducts therefrom the value of the real estate and machinery subject to local taxation, and on the value of the capital stock thus arrived at, the tax is levied.[4] The validity of this tax was questioned by the Western Union Telegraph Company, and the case was carried to the United States Supreme Court, and decided in favor of the constitutionality of the tax, as will be seen later.[5]

§ 790. **Michigan.** — In this State telegraph companies are obliged to pay an annual tax of twenty-five cents upon every mile of line, which tax is in lieu of all other taxes. Incorporated companies are obliged to pay an annual tax of one per centum on the whole amount of capital stock paid in, including investment of earnings in the business, and money

[1] Rev. Stats. ch. 6, §§ 48–51. See *post*, §§ 835–838.

[2] Laws 1890, ch. 245. [3] Laws 1890, ch. 559, § 1.

[4] Pub. Stats. ch. 13, §§ 38–42, 46.

[5] Telegraph Co. *v.* Massachusetts, 125 U. S. 530; Attorney-General of Mass. *v.* Western Union Telegraph Co., 141 U. S. 40; *post*, §§ 835, 839, 840

borrowed and remaining unpaid, this tax being in lieu of all taxes upon the real and personal property of the company.[1] Foreign telegraph companies are obliged to pay a specific tax of two per centum on the gross receipts of the company during the preceding year.[2]

§ 791. **Minnesota, Mississippi.** — In Minnesota[3] the mode of taxation is the same as is in Iowa.[4] In Mississippi, by a recent act, telegraph companies pay a specific sum, varying according to the length of the lines. A company operating a thousand miles or more pays $250. A company operating less than a thousand miles pays $25 per mile.[5]

§ 792. **Missouri, Nebraska, New Hampshire.** — In Missouri telegraph companies are assessed and taxed in the same manner as railroad companies.[6] In Nebraska the company is obliged to make a return showing the number of miles of line in each county, and the total number in the State, and also the personal property necessary for the construction, repair, or successful operation of the lines.[7] In New Hampshire telegraph companies are obliged to pay an annual tax upon the value of the line within the State, including poles, wires, instruments, apparatus, office furniture, and fixtures, at a rate as nearly equal as may be to the average rate of taxation at that time upon other property throughout the State.[8] The real estate not used in ordinary business, however, is taxed locally.[9]

§ 793. **New Jersey.** — In this State telegraph companies pay an annual tax by way of license for the corporate fran-

[1] How. Ann. Stats. §§ 3688, 3689, 3702,-3709. As to validity, see *post*, § 837.

[2] How. Ann. Stats. §§ 3714-3717.

[3] Laws 1891, ch. 8.

[4] *Supra*, § 786.

[5] Laws 1892, p. 258. As to validity, see *post*, §§ 837-839.

[6] Rev. Stats. (1879) §§ 6901-6904; Laws 1887, p. 239.

[7] Comp. Stat., ch. 77, art. 1, § 39.

[8] Pub. Stats. ch. 64, §§ 3-12. As to validity, see *post*, § 837.

[9] Pub. Stats. ch. 55, § 6.

chise, which is ascertained as follows: The company makes a report stating the gross amount of its receipts from business done in the State during the year, and the amount of dividends declared or paid during the same time, and the company is then obliged to pay at the rate of two per cent per annum upon the gross amount of its receipts.[1] Telegraph companies, however, upon their organization, are obliged to pay a fee of one half of one per cent upon the total capital stock.[2]

§ 794. **New York, North Carolina.** — In New York telegraph companies are obliged to pay a tax upon the corporate franchise or business, at the rate of five-tenths of one per cent upon the gross earnings in the State for telegraph business transacted in the State. Any portion of the telegraph line in any town or ward in the State is assessed in the town or ward in the same manner as lands. The word "line" in this connection includes the spot in the land upon which the pole stands, the license of erecting the poles on the land, also poles, arms, insulators, wire, and apparatus, instruments, and other things connected with or used as a part of the line.[3] In North Carolina telegraph companies are obliged to pay a tax of two per centum on their gross receipts within the State.[4]

§ 795. **Ohio.** — In this State it is the duty of telegraph companies to make a return of their capital stock, place of business, par value and market value, or if there be no market value, actual value of the shares; also in detail, the entire real estate and personal property of the companies, and where located, and the assessed value; also the whole length of their lines, and the length within and without the

[1] Laws 1892, ch. 76. As to validity, see *post*, §§ 819, 824.

[2] Rev. p. 1125, § 5.

[3] 3 N. Y. Rev. Stats., Birdseye, p. 3013, § 338; p. 3020, §§ 370–374. As to validity, see *post*, § 837.

[4] Laws 1891, ch. 323, § 40.

State of Ohio, including leased or other controlled lines. And the State Board of Appraisers makes a valuation of the total property of the company within the State in proportion to the entire property of the company as determined by the value of the capital stock, and other evidence. This valuation is apportioned among the various counties in proportion to the length of the lines within the counties, and this same principle is applied in regard to cities, villages, townships, and districts, and the valuation thus arrived at is assessed and taxed at the same rate as other real and personal property in said cities, villages, townships, and districts.[1]

§ 796. **Pennsylvania, Rhode Island, South Carolina.** — In Pennsylvania telegraph companies have to pay the State a tax of eight mills on the dollar upon the gross receipts from business done wholly within that State, and for the purpose of collecting this tax, the company is obliged to make returns showing the gross receipts from all sources, and also the gross receipts from business done in the State.[2] In Rhode Island telegraph companies are obliged to make an annual report setting forth the gross receipts derived from business transacted wholly within the State, from whatever source the same may come, whether the transmission of messages, the use of machines, or otherwise, and the company is obliged to pay a tax of one per centum of such gross receipts for the use of the State, which is in lieu of all other taxes on its lines and personal estate used exclusively in telegraphic business within the State.[3] In South Carolina the right of way, toll houses, structures, tools, machinery, poles, wires, fixtures, and real estate, owned and necessarily in daily use, of any telegraph company in the transaction of its business, are, for taxing purposes, if the company is organized in that State, treated as personal property, but the

[1] Laws 1893, p. 330. See also *post*, § 839.

[2] Laws 1889, No. 332, § 23. See also *post*, §§ 819–824.

[3] Pub. Stats. ch. 27, § 10. As to validity, see *post*, § 824.

lien for the tax attaches to said property as if it were real estate. The company is obliged to make returns thereof, with the other personal property of the company, and they are apportioned among the towns, etc., in proportion to the value of the telegraph line in each. Telegraph companies are obliged to make a statement to the Comptroller-General showing the value of all their personal property in the State, including poles, wires, batteries, machinery, materials, and apparatus, and the place where they are situated, together with the gross earnings of the company for business done in that State, from which total may be deducted the office expenses of a central office, excepting rents and officers' salaries, and the company is taxed on the value so returned.[1]

§ 797. **Tennessee.** — In this State, by an early statute, telegraph companies were taxed in the same manner as railroad companies, upon a valuation of the total property in the State, less $1000, which remainder was held to be the value of the property for such taxation. This valuation was divided by the mileage, and for county taxes the value per mile as thus ascertained was multiplied by the number of miles within the county.[2] By a recent act, however, telegraph companies, in lieu of all other taxes, except *ad valorem* taxes, are required to pay taxes graded according to the mileage. Companies operating a thousand miles of line in the State are required to pay $4000 on any messages transmitted wholly within the State, and not in the service of the United States government. Companies operating from three hundred to a thousand miles of line in the State are required to pay $1000 for similar messages. Companies operating from one hundred to three hundred miles of line in the State are required to pay $300 for similar messages. Companies operating from twenty-five to one hundred miles of line in the State have to pay $25 for similar messages.[3]

[1] Gen. Stats. §§ 179, 189. [2] Code, §§ 709–711.

[3] Acts 1893, ch. 89, § 4. As to validity, see *post*, § 837.

§ 798. **Texas, Vermont.** — In Texas telegraph companies are obliged to pay one cent for every full rate message sent by any person within that State to any person within that State, and one half cent for every message less than full rate, but railroad messages for running trains are not to be taxed, nor messages sent on official business by officers of the United States.[1] In Vermont the mode of taxing has been changed several times within recent years. The original method was to require of telegraph companies payment of a specific tax of two per cent on the gross amount of all receipts within the State, which was in lieu of all other taxes upon the lines and personal estate of the company used exclusively in telegraphic business.[2] By a later statute, telegraph companies were required to pay a tax of ten per cent upon the gross receipts of their business earned wholly within the State.[3] By a still later act, every telegraph company is required to pay an annual tax upon the property or corporate franchise, which is assessed at the rate of sixty cents per mile for line of poles and one wire, and forty cents per mile for additional wires, or in lieu thereof three per cent of the gross earnings of the corporation received within the State.[4]

§ 799. **Virginia.** — In this State telegraph companies are required to make returns showing the property located in each county, as follows. Number of miles of line in the whole State and in each county; number of wires per mile; real and personal estate in the whole State, showing county of location; gross earnings and receipts in the State for the twelve months preceding the return. On these returns the lines and other property of the company is to be assessed. On the real and personal property of the company, as thus

[1] Sayles' Annot. Stats., art. 4665; telegraph companies, p. 568. See also *post*, §§ 819–824.

[2] Rev. Laws, § 3663.

[3] Laws 1890, No. 3, §§ 20, 21.

[4] Laws 1892, No. 15. As to validity, see *post*, §§ 837–839.

assessed, there is a tax of thirty cents on every hundred dollars for the support of the government, and a further tax of ten cents on every hundred dollars for the support of public free schools. There is also a privilege tax of $250, and one per cent of the gross earnings of the company from business in the State per year if the office receipts are not less than $1000.[1]

§ 800. **Washington.** — In this State telegraph companies are obliged to make a return showing, first, the amount of capital stock and the number of shares; second, paid-up capital; third, market value or actual value of the shares; fourth, total indebtedness except current operating expenses; fifth, length of line in each county and total in the State; sixth, total assessed valuation of its tangible property, including the date, character, extent, and value of the franchise, number of poles per mile, number of wires; and the property of the company as thus returned is listed and assessed for taxation, and subject to the same levies as individuals and other corporations.[2]

§ 801. **West Virginia.** — In this State the property of telegraph companies is assessed for taxation as other property in the State, but stock notes of such companies are not to be considered a part of the indebtedness of the maker. Foreign companies must make returns showing gross receipts on messages sent or received within the State, and a tax of two per cent on the gross amounts of the receipts must be paid, which is in full for State taxes only.[3]

§ 802. **Wisconsin.** — In this State telegraph companies must make a report to the State treasurer, showing the total number of miles and number of miles within the State; number of wires on each division of the line, and the aggre-

[1] Acts 1889-90, ch. 244, §§ 24, 25, p. 197. As to validity, see *post*, §§ 819–834.

[2] Hill's Stats. & Codes, § 1056.

[3] Code, ch. 34, §§ 6–9, 11, 13, 14. As to validity, see *post*, §§ 819–824.

gate number of miles of single wire in the State; number of offices in the State; number and value of the various instruments and other property used in constructing, repairing, or operating the line; proportion of indebtedness equitably chargeable to lines within the State; cost of the lines owned or operated within the State; and any other facts or figures required by the State treasurer; and the company is required to pay an annual license fee graded according to the number of wires as follows. For the first wire, $1.00 per mile; for the second wire, 50 cents per mile; for the third wire, 25 cents per mile; for the fourth and all additional wires, 20 cents per mile.[1] In this State, however, all the property except real estate, of telegraph companies, is exempt from taxation.[2] In this State, also, telegraph poles cut in the State and owned by persons or corporations not residing in the State, and having no agent in the State, are assessed where the same are banked or piled for shipment.[3]

§ 803. **Wyoming.** — In this State telegraph companies are obliged to list for assessment and taxation the following described property: Telegraph lines, furniture and fixtures, including the number of miles in Wyoming and in each county. The State Board of Equalization thereupon values and assesses the property for each mile of line by dividing the number of miles into the total valuation of the line, not including any property of the company not used in connection with the operation of the line, this latter to be assessed in the county. The valuation per mile being thus determined, the State auditor certifies it to the county officials, together with the assessment per mile, and the number of miles in the county, and upon this assessment the tax is levied.[4]

[1] San. & Berr. Ann. Stats. §§ 1216 a, 1217, 1218.
[2] Ib. § 1038, cl. 15. As to validity, see *post*, §§ 837–839.
[3] Ib. § 1040 a.
[4] Laws, 1890–91, ch. 99.

§ 804. **Penalties for not Making Returns.** — In most States the statutes which have been enacted with reference to the taxation of telegraph companies provide also that if the companies do not make such returns as are required by law, to furnish information to the proper officials assessing the tax, or do not pay the tax when legally assessed, the telegraph company or its officers shall incur special penalties in the nature of fines for this default. These penalties are various in amount and in method of enforcement, and for a full statement of them in each case the statutes which have been cited in the preceding paragraphs must be consulted. It is usual also, in such statutes, to provide that in case the telegraph officials fail to make returns giving sufficient information, the assessors may either make such valuation in the premises as may be necessary, from such information as they can collect from extraneous sources, or may fix an arbitrary amount as a species of penalty.

§ 805. **Telephones included in Telegraph Acts.** — In many States the taxation of telephone companies is regulated by the same statutes which govern the taxation of telegraph companies, the telephone company being included by name in such statutes. This is the case in Colorado, Delaware, Minnesota, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Virginia, and Washington, and for reference to the statutes in each case the reader is referred to the preceding sections in which the telegraph tax statutes of those various States are given. In many States, however, special acts have been passed, regulating the taxation of telephone companies in a different manner from that of telegraph companies. These statutes are as follows: —

§ 806. **Alabama.** — In this State telephone companies are obliged to make a return of the property and receipts in the same manner as telegraph companies, and are assessed in the same manner, and the property and receipts so returned are assessed together with the other taxable

property of the company in the county.[1] And a tax of one dollar on the hundred is assessed on the gross receipts from business done in the State.[2]

§ 807. **Arkansas, Connecticut.** — In Arkansas telephone companies are required, in addition to returning their other property to make a sworn statement of the capital stock, setting forth particularly, first, name and location of the company; second, amount of capital stock authorized and the number of shares; third, the paid-up capital and its market value, or if no market value, actual value; fourth, the total debt except that for current expenses, excluding from such debt the amount paid for purchase and improvement of the property; fifth, true valuations of all tangible property belonging to the company, upon which returns the assessment of the tax is based.[3] In Connecticut telephone companies are obliged to make returns showing the number of rented telephonic transmitters in use on the first of July of each year, the number of miles of wire owned, leased, operated or controlled by the company, and to pay a tax of seventy cents upon each of said telephonic transmitters, and also a tax of twenty-five cents on each mile of wire, which taxes are in lieu of all other taxes upon the personal property of the company used exclusively in telephone or telegraphic business: but any real estate owned by the company is liable to taxation in the town where it is situated.[4]

§ 808. **Florida, Georgia.** — In Florida all telephone companies pay a tax graded according to the amount of capital stock of the company. Those having a capital of between $50,000 and $100,000 pay a license tax of $50. Those having a capital of between $25,000 and $50,000 pay a license tax of $30. Those having a capital of less than $25,000 pay a license tax of $20. Those having a capital of

[1] Code, § 508.
[2] Code, § 454. cl. 6; Stats. 1893, ch. 389.
[3] Dig. §§ 5645, 5646.
[4] Stats. 1889, ch. 178; §§ 3, 4.

less than $10,000 pay a license tax of $10.[1] In Georgia telephone companies are obliged to pay a tax of $1 for each telephone station or box with instruments complete, rented or used by their subscribers.[2]

§ 809. **Indiana.** — In this State the statute which formerly regulated the subject of telephone taxation provided that the company must return its gross receipts in the State of Indiana annually, and pay the sum of twenty-five cents upon every hundred dollars of such receipts.[3] But a later act provided that the company should make a return showing the total capital stock, number of shares, and par value, principal place of business, market value, or if no market value, actual value of the stock; the real estate, structures, machinery, fixtures, and appliances subject to local taxation, and the location and assessed value thereof; the specific real estate, with permanent improvements, owned by the company, and situated outside of Indiana, and not used directly in the conduct of the business, with its assessed value, and the purpose for which it is used; all mortgages upon the whole or any of its property; the total length of lines, and the length of the lines outside of the State of Indiana, and the length of the lines in each of the counties and townships of the State. Upon this return the property of the company is valued and assessed in the manner stated in a previous section showing the mode of taxing telegraph companies in this State.[4]

§ 810. **Kentucky, Maine, Maryland.** — The acts regulating this matter in Kentucky require the telephone company to pay a franchise tax based upon the value of the capital stock, in the same way as is required of telegraph companies.[5] But by a later statute a road tax is assessed of ten cents per mile for each mile of wire.[6] In Maine every

[1] Acts 1893, No. 1, § 9, cl. 12, p. 12.
[2] Laws 1892, p. 29, § 9, cl. 2.
[3] Rev. Stats. § 6354.
[4] Stats. 1893, ch. 171, § 2.
[5] Stats. §§ 4077–4091.
[6] Acts 1889, ch. 717, § 11.

telephone company is obliged to pay a tax of two and a half per cent on the value of any telephone line in the State, including poles, wires, insulators, transmitters, telephones, batteries, instruments, telephonic apparatus, and office furniture, taking into consideration any circumstances or conditions affecting the value of the property.[1] In Maryland telephone companies are obliged to pay two per cent on the gross receipts.[2]

§ 811. **Massachusetts, Michigan.** — In Massachusetts the earlier statute regulating this subject subjected telephone companies to taxation in the same manner as telegraph companies, apportioning the same, however, upon the number of telephones in use.[3] But by a later act this was amended by striking out the clause as to apportionment.[4] In Michigan every telephone company is taxed in the same way as telegraph companies.[5]

§ 812. **Mississippi, Tennessee.** — In Mississippi telephone companies are obliged to pay taxes graded according to the number of subscribers. Those having twenty subscribers or less pay $5; more than twenty and not more than thirty-five, $10; more than thirty-five and not more than fifty, $15; more than fifty and not more than seventy-five, $25: more than seventy-five and not more than one hundred, $35; more than one hundred and not more than one hundred and fifty, $75; more than one hundred and fifty, $100. This in lieu of all other State and county taxes.[6] In Tennessee telephone companies pay $50 annually per box for business done within the State other than interstate.[7]

§ 813. **Texas, Vermont.** — In Texas each telephone company pays an annual tax of $50 and a county tax of $10 for each county in which it does business; also an annual tax

[1] Rev. Stats. ch. 6, §§ 52–54.
[2] Laws 1890, ch. 559, § 1.
[3] Acts 1885, ch. 267.
[4] Acts 1886, ch. 270.
[5] Ann. Stats. § 3718 a.
[6] Miss. Laws 1892, p. 258.
[7] Acts 1893, ch. 89, § 4.

of 25 cents on each telephone in use in the State, and the real and personal property of the company is taxed in addition.[1] In Vermont telephone companies are obliged to pay a tax at the rate of three per cent annually on the gross receipts of all their business earned wholly within the State, including sums received for rental of instruments; but there shall be deducted from such gross receipts the amount paid by the company to any telegraph company with whom they are connected for the transmission of messages.[2]

§ 814. **Wisconsin.** — In this State telephone companies are obliged to forward to the State treasurer a true statement of the gross receipts during the year, and to apply for a license and to pay therefor a fee of one and one-half per cent of the gross receipts within the State.[3] By a later statute, the license fee is raised to two and three-fourths per cent of the gross receipts.[4]

§ 815. **Electric Light Companies, Taxation.** — Electric light companies are often taxed in the same manner as ordinary manufacturing corporations,[5] and in many States there have not been special acts passed which expressly apply to them. In New Jersey, Pennsylvania, and Washington the statutes relating to the taxation of telegraph companies apply also to electric light plants.[6] In New York a special act has been passed on this subject. In Maryland such companies are obliged to pay one-half per cent on the gross receipts.[7]

§ 816. **Taxation of Electric Railways.** — The taxation of electric railways is not generally different from the taxation of ordinary street or other railways. In one State, Georgia, electric railways are expressly included in the statute relating to the taxation of railroads.[8] In New Jersey electric

[1] Sayles' Annot. Stats., art. 4665, p. 568; Suppl. art. 4665, p. 866.
[2] Laws 1890, No. 3, §§ 20, 21.
[3] San. & Berr. Ann. Stats. § 1222 a.
[4] Laws 1891, ch. 166.
[5] See *post*, § 854.
[6] See those States in preceding sections. So Ky. Stats. § 4077.
[7] Laws 1890, ch. 559, § 1.
[8] Laws 1889, No. 755, p. 36.

railroads, horse railroads, and cable roads are required to make a return to the State, upon which the taxation of the company is based.[1]

§ 817. **Decisions on Taxation.** — There have been many decisions of the courts upon the validity of these various modes of taxation, which will now be examined. It may be said, in summarizing the decisions as to telegraph companies, which form the more numerous and important cases on this subject, that the main question arises out of the position of the telegraph as a means of interstate commerce, a position which has been uniformly sustained by the Supreme Court of the United States, and which affects in many ways the taxation of such companies.[2]

§ 818. **Power of State to tax.** — In general the power of taxation is an attribute of sovereignty, and as such resides in the representatives of the people, that is, in the State legislature, which has full power to tax all persons and property within its jurisdiction, subject only to restrictions of this power contained in the constitution of its own State, or in the Constitution of the United States. This power extends over aliens residing or doing business within its jurisdiction, as well as citizens, and may be exercised to an unlimited extent except as above stated, not only upon all property, real and personal, within its limits, but on all occupations, trades, professions, franchises, and other rights carried on or existing within the same territorial limits.[3] This power of the State, however, is subject to a special limitation in the case of telegraph companies, which, when they have accepted the provision of the Telegraph Act of

[1] Laws 1889, ch. 208.

[2] A railroad company which operates a telegraph line for running its trains is not a telegraph company for the purpose of taxation. Adams *v.* Louisville, N. O. & T. Railway Co., 13 So. Rep. 932.

[3] Lane Co. *v.* Oregon, 7 Wall. 77; Railroad Co. *v.* Peniston, 18 Wall. 29; State *v.* Western Union Telegraph Co., 73 Me. 518.

Congress,[1] are, as has been shown in earlier sections,[2] considered to be agents of the government for the transmission of government messages between the departments throughout the United States, and therefore not taxable on government messages, and also to be means or instruments of interstate commerce, and therefore not taxable on messages sent between the States.[3]

§ 819. **Tax on Receipts from Messages.** — A form of tax statute which has been enacted in several States is that imposing a tax upon the gross receipts of the telegraph company for messages transmitted by it, or gross earnings of the company. The objections to it are that, so far as messages sent from one State to another, or messages sent by the various departments of the federal government are concerned, such a tax is a tax on interstate commerce, or on the actions of the federal government, and therefore against the Constitution of the United States, which gives Congress the sole power of regulating interstate commerce, or against the inherent right of the federal government to exercise its powers without restraint of any kind from the States. The result has been finally arrived at in the Supreme Court of the United States, that such a tax as this is valid only as concerns messages transmitted wholly within the State imposing the tax, and not sent by the federal government. If the receipts can be separated so as to show what portion comes from interstate and governmental business, and this portion is exempted from the tax, the remainder will be upheld by the federal courts.[4]

§ 820. **Texas Case, Massachusetts Case.** — The first case on this point in the United States Supreme Court was decided in 1881.[5] In this case the tax was imposed by the State of

[1] U. S. R. S. 5263. [2] *Ante*, §§ 38–58.

[3] Western Union Telegraph Co. *v.* Texas, 105 U. S. 466; *ante*, §§ 52–58.

[4] Ratterman *v.* Western Union Telegraph Co., 127 U. S. 411; Western Union Telegraph Co. *v.* Pennsylvania, 128 U. S. 39.

[5] Western Union Telegraph Co. *v.* Texas, 105 U. S. 460.

Texas, and was a specific tax of one cent for every full rate message sent, and one-half cent for every message less than full rate. This tax[1] was imposed by authority of the State constitution, which gave the legislature power to impose occupation taxes. The Western Union Telegraph Company refused to pay this tax, and suit was brought in the State court for recovery of the amount. The tax was sustained by the State court, but on appeal to the United States Supreme Court it was overthrown. Chief Justice Waite delivered the opinion of the latter court, and began by broadly asserting the position of the telegraph as an instrument of foreign and interstate commerce, and as a government agent for the transmission of messages on public business, and as such entitled to the especial protection of the federal courts (a position which has been carefully upheld by these courts ever since then). He then goes on to say that the precise question is whether the power to tax the telegraph company's occupation can be exercised by placing a specific tax on each message sent out of the State or sent by public officers on the business of the United States, and, after examining similar cases, concludes that it cannot, and says: "The tax is the same on every message sent, and because it is sent, without regard to the distance carried or the price charged. It is in no respect proportioned according to the business done. If the message is sent, the tax must be paid, and the amount is determined solely by the class to which it belongs. If it is full rate, the tax is one cent, and if less than full rate one-half cent. Clearly, if a specific tax for every two thousand pounds of freight carried is a tax on the freight, for every measured ton of a vessel a tax on the tonnage, or for every passenger carried a tax on the passenger, or for the sale of goods a tax on the goods, this must be a tax on the messages. As such, so far as it operates on private messages sent out of the State, it is a regulation of foreign

[1] Tex. Rev. Stats., art. 4655.

and interstate commerce, and beyond the power of the State. That is fully established by the cases already cited. As to government messages, it is a tax by the State on the means employed by the government of the United States to execute its constitutional powers, and is therefore void." He concludes that as to such messages the tax is void, but that any tax which the State may put on messages sent by private parties, and not by agents of the government of the United States, from one place to another, exclusively within its own jurisdiction, will not be repugnant to the Constitution of the United States. The next case in the Supreme Court of the United States in point of time, was a Massachusetts case, which is slightly different in principle, and which will be discussed later.[1]

§ 821. Ohio Case. — Following that came an Ohio case, under an earlier statute of that State, now superseded.[2] In this case the company made a return under protest to the County Auditor, of its gross receipts. The State imposed a tax based upon the gross receipts per annum. The company proceeded in the Circuit Court of the United States for an injunction to restrain the collection of the tax, and on agreed facts, showing that it was possible to separate the receipts from messages between the States, and receipts from messages wholly in Ohio, the Circuit Court enjoined the collection of this tax except as based on receipts for the transmission of messages wholly in Ohio. On appeal the Supreme Court upheld this decision, Mr. Justice Miller delivering the opinion, and holding that a single tax, assessed upon the receipts of the telegraph company, which were derived partly from interstate commerce and partly from commerce within the State, but which were returned and assessed in gross, and without separation or apportion-

[1] Western Union Telegraph Co. *v.* Attorney-General of Mass., 125 U. S. 530.

[2] Ratterman *v.* Western Union Telegraph Co., 127 U. S. 411.

ment, is not wholly invalid, but is invalid only in proportion to the extent that such receipts were derived from interstate commerce.

§ 822. **Alabama Case, Pennsylvania Case.** — The next case was an Alabama case,[1] which will be elsewhere discussed, as it relates to a license tax, and not a tax directly on gross receipts. The next case was a Pennsylvania case, which was another case of tax on gross receipts of the telegraph company.[2] This case was originally brought in the State court which sustained the tax as being, in effect, a tax on the actual money of the telegraph company in the State considered as property.[3] On appeal to the United States Supreme Court, the decision was reversed, and a similar decision given as in the Ohio case for similar reasons.

§ 823. **Alabama Case.** — The next case was an Alabama case.[4] This case arose upon a tax imposed by the State of Alabama on the gross amount of the receipts of all telegraph companies derived from business done in that State, at the rate of two dollars on every hundred dollars. The assessors assessed a tax on all messages sent wholly within the State, but then insisted that they were entitled to assess a tax on so much of the receipts from other messages as represented the transportation thereof in the State. The company refused to pay the tax, but the Supreme Court of Alabama held it to be constitutional, so far as the constitution of Alabama was concerned, and not to be an unlawful interference with interstate commerce.[5] This decision was reversed by the Supreme Court of the United States on appeal, that court laying down the principle in final form as follows: —

[1] Leloup *v.* Port of Mobile, 127 U. S. 640.

[2] Western Union Telegraph Co. *v.* Pennsylvania, 128 U. S. 39.

[3] Western Union Telegraph Co. *v.* Com., 110 Pa. St. 405.

[4] Western Union Telegraph Co. *v.* Alabama State Board of Assessment, 132 U. S. 472, 1889.

[5] Western Union Telegraph Co. *v.* State Board of Assessment, 80 Ala. 273.

§ 824. **Rule as stated by the United States Supreme Court.** — "That principle is in regard to telegraph companies which have accepted the provisions of the Act of Congress of July 27, 1866,[1] that they shall not be taxed by the authorities of a State for any messages or receipts arising from messages from points within the State to points without, or from points without the State to points within, but that such taxes may be levied upon all messages carried and delivered exclusively within the State. The foundation of this principle is that messages of the former class are elements of commerce between the States, and not subject to legislative control by the States, while the latter are elements of internal commerce, solely within the limits and jurisdiction of the State, and therefore subject to its taxing power." The principle is thus clearly settled in the United States courts, and any cases in State courts which uphold the validity of such a form of taxation must be considered as overruled.[2]

§ 825. **Principle of Tax.** — The foregoing decisions render it clear that any tax imposed by a State upon a telegraph company which affects interstate or governmental messages, would be declared void by the federal courts, and in accordance with this principle the State courts in several States in such cases have declared the tax assessed by the statutes of their own State to be invalid. Such an effect may arise indirectly as well as directly. Thus a license tax, or tax for the privilege of doing business in a State, city, or town, may indirectly be a tax on interstate or governmental messages.

§ 826. **License Tax.** — Whether a State, city, or town may impose a license tax pure and simple, upon a telegraph company for the right of doing business in the State, city, or town, therefore depends upon the same questions which

[1] Sections 5263–5268, of the Rev. Stats. of the United States.

[2] Western Union Telegraph Co. *v.* Mayer, 28 Oh. St. 521.

have been already discussed as to the right of a State to impose a tax upon the message receipts or gross earnings of the corporation. A license tax may legally be imposed by either State, city, or town, provided the local statutes relating to taxation in the State admit of it, and provided the tax is expressly stated not to apply to governmental telegrams or to interstate business.[1]

§ 827. **License Tax** (*continued*). — This point has recently been considered in the federal courts in a case arising in Charleston, S. C. In this case a State statute gave municipalities the right to exact licenses from all persons carrying on businesses of certain kinds within their limits. In accordance with this statute the municipality of Charleston required telegraph companies to take out a license to do business in that city, and imposed a fee for the granting of the license. The Western Union Telegraph Company and the Postal Telegraph Cable Company refused to take out licenses, and were accordingly sued by the municipal authorities to recover the amount of the fees. The companies contended that this requirement of a license was either a restriction in the nature of a condition precedent to the carrying on of their business, which was void as being a restriction of interstate commerce, or else that it was a tax on interstate messages and therefore void. The Circuit Court, however, held that the license fee in question was in reality a tax, the issuing of the license being in the nature of a receipt for the payment of the tax, and that as the tax was expressly laid on "business done exclusively within the city of Charleston, and not including any business done to or from points without the State, and not including business done for the government of the United States, its officers or agents," the tax was not void as being a restriction on inter-

[1] Western Union Telegraph Co. *v.* City Council of Charleston, 56 Fed. Rep. 419; Postal Telegraph Cable Co. *v.* Same, Ib., 153 U. S. 692; Western Union Telegraph Co. *v.* Fremont, 58 N. W. Rep. 415.

state commerce nor on a government agency, and this holding was affirmed in the United States Supreme Court.[1] The latter court considered the further question of whether the fact that the telegraph line was wholly on post roads was sufficient to exempt the company owning it from taxation on its property within the State, and held that it was not.

§ 828. **Virginia Case.** — In a case in Virginia,[2] such a tax was held to be constitutional even where it made no exception of interstate commerce or governmental messages, that court holding that the telegram was not interstate commerce, but was a means of interstate commerce, and that a tax upon the means of interstate commerce was not a tax upon interstate commerce, and therefore not obnoxious to the constitutional provision of the United States relating to interstate commerce. This decision, however, may perhaps be regarded as an extreme case. The ordinance of the city in question divided telegraph companies into four grades, according to the amount of business done by each grade, without regard to the character of the business, and taxed each grade proportionately. It would seem that so far as this tax affected interstate messages, that is, all messages which are not transmitted wholly within the State, and as regards messages sent by the federal government, this decision is inconsistent with the decision of the United States Supreme Court.

§ 829. **Leloup v. Port of Mobile.** — This precise question was directly adjudicated by the Supreme Court of the United States in the above-named case.[3] In this case the collector of the port of Mobile imposed a license tax upon the telegraph company for the privilege of carrying on business within the limits of the port. The State court held this tax

[1] Western Union Telegraph Co. *v.* Charleston, 56 Fed. Rep. 420; Postal Telegraph Cable Co. *v.* Charleston, Ib. Affirmed 153 U. S. 692.

[2] Western Union Telegraph Co. *v.* Richmond, 26 Gratt. 1.

[3] Leloup *v.* Port of Mobile, 126 U. S. 640; s. c. Port of Mobile *v.* Leloup, 76 Ala. 401.

to be constitutional, and not to be obnoxious to the Constitution of the United States or to the rights and privileges of the federal government.[1] On appeal, however, to the United States Supreme Court, that court held that the tax was a tax upon the business of the company, and as such affected the interstate commerce business as well as the local business, and was therefore void.[2] In a case in Wisconsin,[3] the court evaded the question of the constitutionality of such a tax by holding that the city had no power under its charter to impose it.

§ 830. **Tax on Poles.** — Cities and towns may impose a reasonable tax for the occupation of the streets by the poles and wires of a telegraph company. The right to impose such a tax is generally based on one of two grounds, either that the tax is in reality a rental which is paid to the city or town for the use of the streets, or that the city or town is entitled to demand from the telegraph companies sufficient money to recompense it for the expense of inspection of the wires and poles with a view to the public safety. The subject was fully considered and rested upon the former basis in a case arising in St. Louis, which was carried to the Supreme Court of the United States.[4]

§ 831. **St. Louis v. Western Union Telegraph Company.** — In this case the city of St. Louis had passed an ordinance which provided among other things that all telephone and telegraph companies which were not by ordinance taxed upon their gross incomes for city purposes, should pay to the city for the privilege of using the streets, alleys, and public places, the sum of five dollars per annum for every telephone or telegraph pole erected or used by them in the streets,

[1] Port of Mobile *v.* Leloup, 76 Ala. 401.

[2] Leloup *v.* Port of Mobile, 126 U. S. 640.

[3] Wisconsin Telephone Co. *v.* Oshkosh, 62 Wisc. 32.

[4] St. Louis *v.* Western Union Telegraph Co., 148 U. S. 92; s. c. 149 U. S. 465; s. c. 39 Fed. Rep. 59. Cf. Lancaster *v.* Edison Elec. Ill. Co., 8 Pa. Co. Ct. 178; 2 Am. El. Cas. 116.

alleys, and public places. The Western Union Telegraph Company refused to pay this tax, and suit was brought against it in the clerk's office of the city court in St. Louis. The suit was removed to the Circuit Court of the United States by the defendant, and that court held that the tax was unreasonable and void.[1] On writ of error the Supreme Court of the United States reversed this decision, holding first, that the tax was not a privilege or license tax, since the amount to be paid was not graded by the amount of business done, nor was it a sum fixed for the privilege of doing business, but rather in the nature of a rental. Second, that as the use which the defendant made of the streets with its poles and wires was permanent and exclusive as to the space occupied, the public were to this extent deprived of the use of the street, and therefore the city might charge rental therefor. Third, that as the franchise granted the telegraph companies by the Act of Congress does not convey an unrestricted right to appropriate public property, but only a right to be exercised in subordination to public as well as private rights, any appropriation of property by the telegraph company should be paid for if the city owning it so demanded. The court furthermore held that the question of whether or not the rental demanded is reasonable, is a question for the trial court, and cannot be ruled as a matter of law unless the rate is clearly excessive, and also that the tax must not be inconsistent with a previous gratuitous grant of the right to occupation. On petition for a rehearing, the defendant claiming that the city had no authority under its charter to demand rental for the use of the streets, the court examined the powers of the city under its charter and held them to be sufficient, laying particular stress upon the phrase authorizing the city "to regulate the use of the streets," which it held to include a power to charge rental for the use of the streets by the telegraph companies.

[1] 39 Fed. Rep. 59.

§ 832. **St. Louis v. Western Union Telegraph Company. Later Case.** — This question of the right of the city of St. Louis to impose a tax of $5 per pole for the use of the streets by telegraph companies, was again considered in a later case in the Circuit Court of the United States, where the court, in accordance with the decision of the Supreme Court of the United States,[1] held that such a tax was valid if reasonable, but held that a tax of $5 per pole was evidently unreasonable because so much larger than the valuation of rentals for proportionate spaces of adjoining property.[2]

§ 833. **Tax on Poles** (*continued*). — The same general principle authorizing a city or town to impose a tax upon electric companies for the use of the streets for their poles and wires, was asserted in Pennsylvania in several cases.[3] In these cases it appeared that the city had provided for certain care and inspection of all electric poles and wires within the city, with a view to protecting the public safety by ordering the removal of unsafe wires or unsound poles, and the court held that an ordinance imposing a tax upon every pole and mile of wire in the streets was merely an exercise of the police power of the city, and intended to remunerate it for the expense of the supervision and care of the wires which it exercised, and was thus a legal tax, and would not be held illegal as a matter of law unless the charge was clearly excessive.[4] When the first of these cases, however, was removed to the federal court,[5] the court held, as a matter of law on the evidence in the case, that the tax was clearly excessive. It appeared from the evidence that the amount

[1] St. Louis *v.* Western Union Telegraph Co., 148 U. S. 92; 149 U. S. 465.

[2] St. Louis *v.* Western Union Telegraph Co., 63 Fed. Rep. 68.

[3] Allentown (City of) *v.* Western Union Telegraph Co., 148 Pa. St. 117; Chester (City of) *v.* Philadelphia, Reading & Pottsville Telegraph Co., Ib. 120.

[4] S. P. Western Union Telegraph Co. *v.* Philadelphia, 12 Atl. Rep. 144; Philadelphia *v.* Postal Telegraph Cable Co., 67 Hun (N. Y.), 21.

[5] Philadelphia *v.* Western Union Telegraph Co, 40 Fed. Rep. 615.

received from the tax was more than five times as great as the estimated expenses of inspection and care. The city tried to defend the tax on the ground of possible claims for damages against it from the imperfect construction or maintenance of the wires and poles, but the court held that this could not be considered. In a later case, however, the State court reaffirmed its previous position, even though it appeared that the tax greatly exceeded the cost of care of the poles.[1]

In a case in Louisiana where it did not appear that there was any care or supervision of the poles exercised by the city, and it did appear that the right to occupy the streets with poles and wires had been granted by a franchise without any claim of rental or recompense, the State court held that a tax of five dollars per pole could not be maintained either as a property or license tax, and was invalid and illegal.[2]

§ 834. **Tax on Franchise.** — It would seem that the franchise granted by a State government to a corporation is taxable by the State, for such a tax in no way affects the business of telegraphy, as that can be carried on by individuals as well as by corporations. No direct case deciding this has been found, but the decision in Telegraph Company *v.* Massachusetts[3] seems to bear this out. The franchise granted by the federal government to run the lines on post roads, however, cannot be taxed for the reasons stated in previous sections. Thus, in a recent case in California, the State taxed all the property of the telegraph company, that is, its poles, wires, instruments, etc., and then added on an item "franchise, $50,000," without any explanation, and taxed that. The court held that so far as the item of franchise was concerned,

[1] Philadelphia *v.* American Union Telegraph Co., (Pa.) 31 Atl. Rep. 628.

[2] New Orleans *v.* Great Southern Telegraph, Telephone, etc. Co., 40 La. An. 41.

[3] 125 U. S. 530.

this franchise was a grant from the United States government under the Act of Congress,[1] to which reference has already been made, and was partly for the purpose of sending messages between the several departments of the government of the United States, and also for the purpose of sending messages between the various States, and in this way engaging in interstate commerce, and that this franchise was therefore not taxable by the State.[2]

§ 835. **Character of Tax.** — The question whether a tax is a tax on the franchise of a company or upon its corporate property, is often difficult of decision. In a case arising in Massachusetts where the tax is called a franchise tax, and is ascertained by valuation of the capital stock of the company, and deducting therefrom the value of the real estate of the company plus the proportionate value of the lines outside the State, the tax was finally sustained by the Supreme Court of the United States as being in reality a tax upon the corporate property of the company, and not a tax upon its franchise, there being no other tax in that State upon the corporate property;[3] whereas in a case in Maine where the tax was a specific tax of two and one half per cent on the value of the telegraph lines within the State, including all auxiliary instruments, office furniture, etc., the State court held that it was a tax on the business done by the company, and not on the property. This latter decision, however, was largely due to the fact that in that State a constitutional provision requires all taxes on real and personal property to be equal, and the tax in question was held to be a tax on business rather than on property, on the theory that if of two constructions of the statute one is obnoxious to the constitution and the other is not, the latter will be chosen by the court.[4] The court, in order to arrive at this decision,

[1] U. S. R. S. § 5263 *et seq.*

[2] San Francisco *v.* Western Union Telegraph Co., 96 Cal. 140.

[3] Telegraph Co. *v.* Mass., 125 U. S. 530.

[4] State *v.* Western Union Telegraph Co., 73 Me. 518.

is obliged to lay great stress upon the phrase in the tax statute after the specification of property taxed, "and any circumstances and conditions which affect the value of the property." The court says that this phrase shows that the tax is on the business and not on the property, and also that the kind of property selected for valuation shows an intent to tax the business only, for no real estate or other property is included in the valuation except such as is actually used in the business, and this only while it is used in the business.

§ 836. **Tax graded by Mileage of Lines.** — In Kentucky it was held that a tax law which assessed an arbitrary amount per mile of wire, that is, an amount which was not based upon the value of the property, and which was additional to the tax on the property of the company, was an attempt to tax the business of the company, and as that business included both interstate commerce and governmental messages, a tax which was laid upon the whole business was unconstitutional as contrary to the federal Constitution's provisions in regard to interstate commerce.[1] On the other hand, in Maine, as was seen above, a tax upon the business of the telegraph company has been held valid,[2] but in this case, no question of the tax being opposed to the federal decisions above quoted was raised, and it may be doubted whether the Supreme Court of the United States would have upheld the decision, if the tax is in reality a tax on the business of the company.

§ 837. **Rule given by Supreme Court.** — The Supreme Court of the United States has recently given a decision in which the principle governing taxation of telegraph companies in these mileage statutes is clearly laid down. This principle is that a tax which is in effect a tax upon the property of the company within the State imposing the tax, and does

[1] Com. *v.* Smith, 92 Ky. 38.

[2] State *v.* Western Union Telegraph Co., 73 Me. 518. See *post*, § 837

not exceed the amount which the property might legally be taxed for on a direct valuation and assessment, and which does not make the payment of the tax a condition precedent to the carrying on of the business within the State, and is in lieu of all other taxes, is a valid tax, even though it assumes the form of a license or privilege tax, a tax on the right to carry on the business, or other similar form.[1] This decision was rendered in a case where the tax was imposed in Mississippi, the statute imposing the tax being to the effect that if the telegraph company operated one thousand miles or more of line in the State, it should pay a tax of $3000, but if it operated less than one thousand miles it should pay one dollar per mile, and this tax was in lieu of other State, county, and municipal taxes. The validity of this tax was first passed upon in the Supreme Court of the State,[2] in which the subject is very ably examined by the court, and the tax held to be constitutional, both as concerning the State laws, and as concerning the Constitution of the United States. The court takes occasion to remark upon the somewhat confused status of the law on this point, as rendered in the various decisions of the Supreme Court of the United States on this subject, and then proceeds to give a very clear statement of the reasons why such a tax as the one in question is constitutional.

§ 838. **Opinion in Postal Telegraph Cable Company v. Adams.** — The opinion of the federal Supreme Court states the principles governing this matter as follows: "It is settled that when by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a State on interstate commerce, such a tax is a regulation of interstate commerce, and cannot be sustained. But property in a State, belonging to a corpora-

[1] Postal Telegraph Cable Co. *v.* Adams, 155 U. S. 688.

[2] Postal Telegraph Cable Co. *v.* Adams, 71 Miss. 555.

tion, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed upon the corporation on account of its property within the State, and may take the form of a tax for the privilege of exercising its franchise within the State, if the ascertainment of the amount is made dependent in fact upon the value of the property situated within the State (the exaction, therefore, not being susceptible of exceeding the sum which might be levied directly thereon), and if payment be not made a condition precedent to the right of carrying on the business, but its enforcement left to the ordinary means devised for the collection of taxes. The corporation is thus made to bear its proper proportion of the burden of the government under whose protection it conducts its operations, while interstate commerce is not impeded. . . . Doubtless no State could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing, or operating an instrumentality of interstate or international commerce, or for the carrying on of such commerce; but the value of property results from the use to which it is put, and varies with the profitableness of the use, and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon the property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution." The court held that in the case before it the tax was a commutation of an *ad valorem* tax graded by the length of the lines.[1]

§ 839. **Telegraph Tax in Massachusetts.** — In Massachusetts a tax is assessed upon telegraph companies by the Commissioner of Taxes making a valuation of the capital stock, and then deducting therefrom a sum proportional to the ratio of the part of the lines lying outside of the State, to the whole

[1] Postal Telegraph Cable Co. *v.* Adams, 155 U. S. 688.

amount of lines, and also deducting the valuation of the real estate and machinery of the company subject to taxation in the State. The Western Union Telegraph Company refused to pay this tax, and the attorney-general of Massachusetts brought an information in the State court to compel the payment, and for an injunction against the company transacting business in the State until the tax should be paid. This information was removed to the Circuit Court of the United States.[1] In this court it was held that the franchise for telegraph companies to put poles on post roads was not of such a nature as to render a tax on the corporate franchise illegal; that such a tax was not a tax on interstate commerce, although its effect might be to raise the cost of transmitting messages in and out of the State; and also that the principle itself of the tax was not unjust, and the tax would not be declared void on the ground that no deduction was made of the value of the real estate of the company lying outside the State, although other corporations were entitled to have all their real estate, wherever situated, deducted from their tax valuation.

§ 840. **Decision of United States Supreme Court.** — On appeal to the Supreme Court,[2] it was held that the provision of section 5263 of the United States Revised Statutes did not grant any such franchise as exempted the company from taxation on its property in any State; that it was clear from the mode of assessing the tax in Massachusetts, that the tax was imposed on the capital of the company on account of property owned in that State, as the tax was assessed on a valuation of the total capital less the lines lying outside the State. The court says: "While the State could not interfere by any specific statute to prevent the corporation from placing its lines along these post roads, or stop the use of them after they were placed there, nevertheless the company

[1] Attorney-General *v.* Western Union Telegraph Co., 33 Fed. Rep. 129.

[2] Telegraph Co. *v.* Massachusetts, 125 U. S. 530.

receiving the benefits of the laws of the State for the protection of its property and its rights is liable to be taxed upon its real or personal property as any other person would be. It never could have been intended by the Congress of the United States, in conferring upon a corporation of one State the authority to enter the territory of another State and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the State into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support." Similar cases coming up later were disposed of by the court on the authority of this case.[1]

§ 841. **Tax on Franchise of Foreign Corporation.** — In Illinois, under its revenue act, the capital stock and franchise of a foreign corporation doing business in that State cannot be taxed;[2] but it is held that a foreign telegraph company, leasing a line of telegraph from a company organized within the State, must, under section 53 of that act, annually, in the month of May, return to the auditor of public accounts a schedule or statement of the amount of capital stock authorized, the amount paid up, the market or actual value, etc., in relation to the lessee company, and if it does not do so, such capital and franchise might, it seems, be assessed and taxed by the proper officials; but a failure to make such return would not justify such officers in assessing and taxing the capital and franchise of the lessor company, and if such assessment is made, the lessor company may have an injunction to restrain the collection, even without making such return as to the capital stock, etc., of the lessee company.[3]

[1] Attorney-General of Mass. *v.* Western Union Telegraph Co., 141 U. S. 40.

[2] Postal Telegraph Cable Co. *v.* Barnard, 37 Ill. App. 105; Western Union Telegraph Co. *v.* Lieb, 76 Ill. 172.

[3] Postal Telegraph Cable Co. *v.* Barnard, *supra.*

§ 842. **Tax on Corporate Property.** — Preceding sections show that in some States the property, real and personal, of the telegraph company, is taxed as property in the same manner as other property, as is the case in New York.[1] If this method is employed there is nothing which especially differentiates the mode of assessment of the value of the property from similar valuations in the case of other property in the State, unless specially enacted by statute. Such a mode of taxation is clearly not obnoxious to the provisions of the federal Constitution.[2]

§ 843. **New York Rule on Taxing Property.** — In New York, where a statute provides that the line of a telegraph, telephone, or electric light company, in any city or town, shall be assessed in the same manner as land, it is held not proper to include in the value of the line any considerations arising from its value for telegraph purposes, and its position with its connections, and its productive capacity, since there is also a tax on the business or franchise or earnings of the company; but the valuation should be made on a basis of the cost of construction, plus the interest in the land, and the license or right to erect poles thereon, whatever that may be. The case is different from that of bridge or railway property, in which cases the bridge or piece of track is valued as part of the real estate of the company, and the earning capacity of the bridge or track is an important feature, and it is to be valued as a part of the whole railway. The difference arises from the fact that in the case of railways the company owns the fee of the land, and in determining its value as real estate, the question of its earning capacity is almost necessarily involved, whereas in the case of lines of telegraph or electric light, there is really no land

[1] §§ 775–803; People *v.* Gold & Stock Telegraph Co., 98 N. Y. 67; People, *ex rel.* Western Union Telegraph Co. *v.* Dolan, 126 N. Y. 166.

[2] *Supra*, § 839; Telegraph Co. *v.* Massachusetts, 125 U. S. 530; People *v.* Tierney, 57 Hun, 357.

or real estate in question. The poles, wires, etc., are personal property, to be valued at the cost of production, and the right to set the poles in the public street is a mere license for which nothing was paid, and which therefore has no value.[1]

§ 844. **Equality of Assessment.** — It is often said that taxes must be equally apportioned upon all persons throughout the State. While this is, in a sense, true, yet anything like actual equality of taxation is impossible, and it has been said that a general fairness of intention and lack of gross injustice is sufficient to sustain a tax, even when the constitutional provision of the State requires equality.[2]

§ 845. **Uniformity of Tax.** — The question of what constitutes such uniformity of taxation as renders a tax law constitutional in those States whose constitutions require such uniformity, was considered in a case in Ohio. Article 12, section 2 of the constitution of that State says that laws shall be passed "taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, and otherwise, and also all real and personal property according to its true value in money." By a recent statute in that State (the so-called Nichols Acts) a special tax was laid upon telegraph, telephone, and express companies' properties on a valuation determined by the value of the capital stock of the company and other evidence and circumstances. The Board of Assessors, in computing this tax for the Western Union Telegraph Company, fixed first the market value of the total capital stock of the telegraph company, and then deducted therefrom the value of the stocks and bonds in other companies which it held. It then, by proportion between the mileage of lines in Ohio to the mileage of lines outside the State, arrived at a valuation

[1] People, *ex rel.* Western Union Telegraph Co. *v.* Dolan, 126 N. Y. 166.

[2] State *v.* Western Union Telegraph Co., 73 Me. 518; State *v.* St. Louis, K. C., etc. R. R. Co., 9 Mo. App. 532.

of the proportionate value of the property of the company in Ohio. The Western Union Telegraph Company refused to pay this tax on the ground that it was not uniform under the constitution of the State of Ohio, and the court sustained this view of the subject, saying that any valuation of the property of the telegraph company in Ohio which was based on the value of the capital stock, included certain elements of value which were not included in the ordinary valuation of property for taxation in case of other corporations and individuals; namely, the good-will of the business, the skill and efficiency of the management, and similar items, which, together with the tangible property, made up the market value of corporate stock, which market value depended in most cases more upon the interest-earning capacity of the company than upon its tangible property; and further, that the tax could not be sustained as a franchise tax because it leaves wholly to the discretion of the assessors the basis upon which the franchise shall be valued, a delegation of legislative authority beyond what is permissible. The court therefore held that the Nichols Tax laws were unconstitutional for not applying a uniform rule to telegraph, telephone, and express companies as to all other corporations and individuals.[1]

§ 846. **Repeal of Tax Statute in New York.** — In a case in New York, the question of how far a subsequent tax statute repealed a previous one was considered. An early statute[2] prescribed a mode of taxation of telegraph companies organized in that State whereby, however large the capital of the company might be, the limit of the tax was the cost of the lines of the company in the State. A later statute[3] imposed a franchise tax on telegraph companies based on a valuation of the capital stock, and upon the gross earnings of business trans-

[1] Western Union Telegraph Co. *v.* Poe, 61 Fed. Rep. 449.

[2] Acts of 1853, ch. 471.

[3] Act of 1881, chap. 361.

acted in the State, and this in addition to a property tax upon the property of the company. The telegraph company contended that the subsequent statute only repealed the former in so far as the mode of ascertaining the tax was concerned, and that the limitation of the assessable capital stock to that employed in the State still survived. The court, however, held that the later statute wholly repealed the former, and swept away the limit.[1]

§ 847. **Telephone Company as Telegraph Company for Purposes of Taxation.** — It has already been stated that for some purposes the courts have held that a telephone company is in reality a telegraph company.[2] It has been decided in Iowa that where statutes exist for the taxation of telegraph companies, and no statute has been passed for the special taxation of telephone companies, the telegraph company tax act will be applied by the courts to telephone companies, and they must make the returns and pay the taxes as required by the telegraph tax act.[3]

§ 848. **Taxation of American Bell Telephone Stock.** — In two States, New York and Pennsylvania, attempts have been made to tax the capital stock of the American Bell Telephone Company on the ground that it was doing business in the State where the tax was levied. In neither case was the attempt successful.[4]

These two cases seem to settle conclusively that the American Bell Telephone Company cannot be considered, for the purposes of taxation, under its present system of operations, as a corporation doing business in any State except that of its incorporation (Massachusetts) so long as it adheres to the methods of doing business examined in the above two cases.

[1] People *v.* Gold & Stock Telegraph Co., 98 N. Y. 67.

[2] *Supra*, §§ 13–18.

[3] Telephone Co. *v.* Board of Equalization, 67 Iowa, 250.

[4] Com. *v.* American Bell Telephone Co., 129 Pa. St. 217; People *v* American Bell Telephone Co., 117 N. Y. 241.

§ 849. **Pennsylvania Case.** — In the Pennsylvania case, the Commonwealth of Pennsylvania, through the tax assessors, brought suit to attempt to collect a tax under the statutes of that State from the telephone company, upon so much of its capital as was employed in carrying on business in the State of Pennsylvania. The tax assessors made a statement of the total capital of the company, and apportioned so much thereof as was in their opinion engaged in carrying on the business in Pennsylvania, and taxed this portion. The telephone company appealed from this tax. It appeared that the American Bell Telephone Company was a Massachusetts corporation, and had its principal office in Boston, and had no office, agent, or place of business in Pennsylvania; that all the contracts for rents and leases of telephones were made at Boston, and the payments were also made there; that it leased its telephones by written leases to Pennsylvania corporations, which corporations carried on the business in the State of Pennsylvania, and constructed their own lines, switches, and other apparatus, maintained offices, and paid agents. The court held, therefore, that the capital of the American Bell Telephone Company could not be taxed in the manner attempted, since it was doing no business in Pennsylvania, nor had any of its property there except the telephones which were leased to the Pennsylvania companies. The court further decided that the provision in the leases reserving to the parent company, on default in payment of the rent by the lessee companies, the right to take possession of the telephones and conduct the business of telephoning, created merely a right to conduct business in Pennsylvania, and did not constitute an actual conducting of business, and that if at any time the telephone company should exercise this right, and take possession of the telephones, and carry on the telephone business, it might then be liable for taxation upon the portion of its capital stock then engaged in so doing. The court also indicated *obiter*

that the telephones themselves, being still the property of the American Company, might be subject to taxation in Pennsylvania as property.[1]

§ 850. **New York Case.** — In the New York case, the tax commissioners of the State of New York attempted to impose a tax upon the capital and gross earnings of the Bell Telephone Company in the State of New York. This tax was imposed under chapter 501 of the Act of 1885, which taxes the capital and gross earnings of all corporations in New York State, foreign as well as domestic. The court said that this was a franchise or business tax; and the main question was whether the Bell Company was, in fact, doing business in the State of New York. In order to decide this, it was necessary to investigate the contract between the parent company and the local company in New York State, and see what portions of this contract were actually being carried out in fact by the two companies. On the facts the court held that the Bell Company was not doing business in New York State. The court calls attention to the fact that no attempt to evade taxes is made by this arrangement, for all the property and capital actually employed in New York State is taxed as the property of the local company, and the evident intention of the contracts is that the local company should do all the business, and that under these contracts, by no fair construction, could the local companies be called the agents of the Bell Company.[2]

§ 851. **Exemptions: Stock invested in Patents.** — The question has been discussed in several cases as to whether the capital stock of a company which is invested in or issued for patents or patent rights of the United States, should be considered to be exempt from taxation on the ground that a tax on such stock is practically a tax laid by a State on a franchise granted by the United States government, and

[1] Com. *v.* American Bell Telephone Co., 129 Pa. St. 217.

[2] People *v.* American Bell Telephone Co., 117 N. Y. 241.

therefore illegal. In Pennsylvania it has been held in a number of cases that so much of the capital stock of a corporation as is invested in United States' patents cannot be taxed by the State authorities.[1]

§ 852. **Stock paid for Patented Articles taxable.** — It is, however, only capital which is actually invested in the patents themselves or in rights thereunder, such as licenses, grants, etc., which is so exempt, but capital which is issued in payment for the lease of the use of patented articles, the patentee retaining the ownership of the patents and all rights thereunder, is not invested in patents, and therefore not taxable. Thus it was held that capital stock of a company, which was issued by a local Pennsylvania company to the parent American Bell Telephone Company in payment for the lease of telephones, was not invested in a patent right, and therefore was taxable;[2] and a similar decision was made in regard to a right to use patented electric lighting apparatus sold by a parent company in New York to a local Pennsylvania company.[3]

§ 853. **New York Decisions.** — In New York it is held in a recent case that capital stock issued for patents is taxable in the State where the corporation owning the patents is incorporated.[4] In this case the Edison Electric Light Company was the complaining company. It had all its capital invested in United States letters patent relating to electric lighting. It then granted licenses under these patents to corporations both within and without the State in return for the stock of those companies. The court held that as to

[1] Com. *v.* Edison Electric Light Co., 157 Pa. St. 529; Com. *v.* Westinghouse Electric & Manufacturing Co., 151 Pa. St. 265; Com. *v.* Central D. & P. Telephone Co., 145 Pa. St. 121; Com. *v.* Edison Electric Light Co. Ib. 131; Com. *v.* Chester Electric Light & Power Co., Ib. 131; Com. *v.* Brush Electric Light Co., Ib. 147.

[2] Com. *v.* Central D. & P. Telep. Co., 145 Pa. St. 121.

[3] Com. *v.* Edison Electric Light Co., 145 Pa. St. 131.

[4] People *v.* Campbell, 138 N. Y. 543.

stock of corporations outside of the State, the capital of the New York or parent company was employed out of the State, and was not taxable under the laws of New York, which exempt capital so employed, but as to stock of local corporations organized under the laws of New York, and doing business therein, the capital of the parent company was employed in that State, and therefore taxable; that as to such patents as had not been granted away, *i. e.*, so much territory as was not covered by the licenses aforesaid, the capital of the parent company was taxable in New York, where the corporation had its domicile, as all *choses in action* follow the *situs* of the owner.

The principle in the New York cases seems to be that when a tax is laid upon the capital stock of a company, even though this capital is invested in patents or licenses under patents, the tax is, in effect, a tax on the franchise of the corporation, and not a tax on the patent rights themselves, and therefore is not a tax on a franchise granted by the federal government.

§ 854. **Exemptions to Manufacturing Companies.** — In many States the tax laws exempt from taxation manufacturing companies incorporated in the State, and carrying on their business within the State. It is an open question in most States whether electric light companies, and other electric companies, are to be considered as manufacturing companies under these statutes. It has been held several times in Pennsylvania, however, and must now be considered as settled law there, that a corporation whose business is producing electricity and selling it to customers for the generation of light, heat, and power, is not a manufacturing company within the meaning of these exemptions.[1] In the first case which makes this decision, however, the court says

[1] Com. *v.* Northern Electric Light & Power Co., 145 Pa. St. 105; Com. *v.* Edison Electric Light Co., Ib. 131; Com. *v.* Chester Electric Light & Power Co., Ib.; Com. *v.* Brush Electric Light Co., Ib. 147.

that on general principles, such companies might well be considered manufacturing companies, but holds that the phrase in the Pennsylvania tax statute means only such companies as are specified in the statute providing for the incorporation of manufacturing corporations, which gives a list of such companies, but does not include electric companies.[1]

§ 855. **Exemptions to Manufacturing Companies in New York.** — In New York the courts have held that the companies manufacturing and selling electricity for light, heat, and power are manufacturing companies within the meaning of such an exemption in a tax statute. This decision was undoubtedly affected by the fact that shortly before the decision was rendered, but after the tax sued for had become due, the legislature of New York had passed an act which expressly taxed electric light, heat, and power companies as such, and this statute had great weight with the court as showing that the legislature previously considered such companies to be manufacturing companies within the exemption of the previous tax statute.[2]

[1] Com. *v.* Northern Electric Light & Power Co., *supra.*

[2] People, *ex rel.* Brush Electric Manufacturing Co. *v.* Wemple, 129 N. Y. 543. The opinion of the court contains the following interesting remarks on this subject: "If the question whether a corporation engaged in the business of furnishing electricity for lighting public and private places or for power is a manufacturing company, was made to depend upon the meaning of these words as found in dictionaries, or upon the technical language of science in describing electricity as a force or an agent in nature, it would doubtless be difficult and perhaps impossible to show that the process which the relator calls manufacturing produces anything that in a certain sense and in some form did not exist before. That, however, is true of most if not all manufacturing operations. The application of labor and skill to materials that exist in a natural state, gives to them a new quality or characteristic and adapts them to a new use, and the process by which this result is brought about is called manufacturing, whether the change is accomplished by manual labor or by means of machinery. But we think these considerations are by no means conclusive in discovering the true scope and meaning of the terms 'manufacturing corporations' as they are used in the statute.

§ 856. **Tax as regulated by Dividend.** — When the statute under which a corporation is taxed regulates the amount of taxes by the earning capacity of the corporation, as shown by the annual dividends, and it appears in evidence that the company has declared a dividend within the year for which the tax is assessed, the amount of which renders it legally

The true inquiry would seem to be whether a corporation organized as this is, and carrying on the business that this does, and in the manner shown, would not be considered, in common language, as engaged in some manufacturing process or carrying on some manufacturing business; that, granting all that is said by experts and others about electricity as a natural element or force, to say that electricity exists in a state of nature, and that a corporation engaged in the business that the relator is, collects or gathers it, does not fully or accurately express the process by means of which it is enabled to sell and deliver something useful and valuable to its customers. The business in which the corporation is engaged renders it necessary, in the first place, to invest a large amount of capital in a plant which may properly enough be called a factory. Then it must purchase and consume a vast amount of coal to produce steam and to furnish power for the operation of the machinery. Then it supplies and operates a complicated system of machinery such as boilers, engines, dynamos, shafting, belting, and such other things as are commonly used in manufacturing establishments, and then by means of wire, cables, and lamps, it lights street and private houses by electricity for a compensation. But the electricity or electric current which produces this result cannot properly be said to be the free gift of nature gathered from the air or the clouds. It is the product of capital and labor, and in this respect cannot be distinguished from ordinary manufacturing operations. According to the common understanding, the electricity or thing which produces the results from which the corporation draws its income, is generated or produced by the application of power to machinery, and thus, by means of a process wholly artificial, the relator is enabled to sell the product of its operations to its customers. Passing by the refinements of scientific discussion as to the nature of electricity, it would seem to be common sense to hold that a corporation that does all this is, in every just sense of the term, a manufacturing corporation." The court cites the Pennsylvania case above referred to, and says that the Pennsylvania Supreme Court does not hold that electric companies are not manufacturing corporations, but simply that the meaning of the statute in that State is limited by the phraseology of the Manufacturing Corporations Act. s. p. People, *ex rel.* Edison Electric Illuminating Co. *v.* Wemple, 129 N. Y. 661. Cf. Com. *v.* Westinghouse Electric & Manufacturing Co., 151 Pa. St. 265. An exemption of capital employed in manufacturing purposes does not extend after

liable for such tax, this evidence raises a case sufficient *prima facie* to support the levy of the tax. It is incumbent upon the corporation in such case to show that although the dividend was declared it was partly earned in previous years, but if the court finds as a matter of fact that the dividend does not embrace the earnings of other years, it is not error for the court to maintain the tax.[1]

§ 857. **Tax as determined by Residence.** — When the place of assessment of a tax depends upon the residence of a person, or, in the case of a corporation, on the place where its business is principally transacted, this fact of locality of business is a necessary prerequisite to the valid assessment of the tax, and is a matter of fact which may be shown by competent evidence. If the company, when it makes out its incorporation papers, inserts in them a statement of its principal place of business, this statement is binding on the company if the statute under which it incorporates requires such a statement, but if the statute does not require such a statement the allegation is not conclusive, and may be rebutted by proof showing that, in fact, the corporation carries on its business in a different place.[2]

§ 858. **No Funds no Defence in Actions for Taxes.** — The fact that a corporation has no funds is no defence in a suit by the collector of taxes to recover the amount of a tax legally assessed for the corporation. In the first place, a corporation may have credits and claims which can be reduced to funds and used for the payment of a tax; and in the second

the manufacturing has ceased; and therefore it has been held that under a statute exempting the capital, machinery, and property of a company employed in manufacturing a lot of electric cars which had been manufactured by the company before it ceased operations and were left unsold when it closed up its business, were not exempt from tax after the closing of the company's business. Electric Traction & Manufacturing Co. *v.* New Orleans, 14 So. Rep. 281.

[1] Com. *v.* Brush Electric Light Co. (Pa.), 22 Atl. Rep. 844.

[2] Austen *v.* Westchester Telephone Co., 8 Misc. Rep. (N. Y.) 11; Austen *v.* Telephone Co., 73 Hun, N. Y. 96.

place, this defence is no more available to a corporation than to an individual.[1]

§ 859. **Valuation not to be Arbitrary.** — Where a statute provides that a person aggrieved by an assessment, and making due application for a reduction, shall be examined on oath by the assessing board, and they shall fix the amount of the assessment as they shall decide to be just, the board cannot make a wholly arbitrary decision as to the amount, and if the only evidence given is the examination of the applicant, the board cannot, simply by saying that they made due inquiry, give any other assessment than the examination discloses.[2]

§ 860. **Payment under Protest, Interest.** — Where a company pays in its tax under protest, and then secures a revision of the assessment and a resettlement of the account under a statute which provides for such revision, but not for any repayment of this tax, the company is entitled to interest from the time the payment was made, but cannot have the tax money repaid to it, but only charged on its account and applied in payment of future taxation.[3] If a telegraph company appeals from an assessment laid upon it by the Board of Commissioners, and after the hearing gets a reduction of the assessment, the final decision on the hearing being rendered nearly a year after the time when the tax would have been payable if no appeal had been taken, still the telegraph company must pay interest on the reduced amount of the tax from and after the time when the interest would have been payable if no appeal had been taken.[4]

[1] Austen *v.* Electric Construction & Supply Co., 28 N. Y. Suppl. 81.

[2] People, *ex rel.* Edison Electric Illuminating Co. of New York *v.* Barker, 139 N. Y. 55.

[3] People *ex rel.* Edison Electric Illuminating Co. of New York *v.* Wemple, 133 N. Y. 617.

[4] Western Union Telegraph Co. *v.* State, 64 N. H. 265.

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